

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, et al.,
Plaintiffs,

v.

ROB BONTA, in his capacity as Attorney
General of the State of California,
Defendant.

Case No.: 17-cv-1017-BEN (JLB)

DECISION

We begin at the end. California's ban and mandatory dispossession of firearm magazines holding more than 10 rounds (California Penal Code § 32310(c) and (d)), as amended by Proposition 63, was preliminarily enjoined in 2017.¹ That decision was affirmed on appeal.² In 2019, summary judgment was granted in favor of Plaintiffs and § 32310 in its entirety was judged to be unconstitutional.³ Initially, that decision was also

¹ *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1138 (S.D. Cal. 2017).

² *Duncan v. Becerra*, 742 F. App'x 218, 221 (9th Cir. 2018).

³ *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1133 (S.D. Cal. 2019).

1 affirmed on appeal.⁴ However, the decision was re-heard and reversed by the court of
2 appeals *en banc*.⁵ In 2022, the United States Supreme Court granted certiorari, vacated
3 the appellate *en banc* decision, and remanded the case.⁶ The court of appeals, in turn,
4 remanded the case to this Court “for further proceedings consistent with *New York State*
5 *Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).”⁷ All relevant findings of fact
6 and conclusions of law set forth in the prior decision concluding § 32310 is
7 unconstitutional are incorporated herein.

8 **I. INTRODUCTION**

9 “There is a long tradition of widespread lawful gun ownership by private
10 individuals in this country,” according to the United States Supreme Court.⁸ Americans
11 have an individual right to keep and bear firearms.⁹ The Second Amendment to the
12 United States Constitution “guarantee[s] the individual right to possess and carry
13 weapons in case of confrontation.”¹⁰ This guarantee is fully binding on the States and
14 limits their ability to devise solutions to social problems.¹¹ And the guarantee protects
15 “the possession of weapons that are ‘in common use,’”¹² or arms that are “typically
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19 ⁴ *Duncan v. Becerra*, 970 F.3d 1133, 1147 (9th Cir. 2020), *reh’g en banc granted*,
20 *opinion vacated*, 988 F.3d 1209 (9th Cir. 2021).

21 ⁵ *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (*en banc*).

22 ⁶ *Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

23 ⁷ *Duncan v. Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022).

24 ⁸ *Staples v. United States*, 511 U.S. 600, 610 (1994).

25 ⁹ *District of Columbia v. Heller*, 554 U.S. 570, 630 (1980).

26 ¹⁰ *Id.* at 606 (quoting 2 Tucker’s Blackstone 143) (“This may be considered as the true
27 palladium of liberty The right to self defence is the first law of nature: in most
28 governments it has been the study of rulers to confine the right within the narrowest
limits possible.”).

¹¹ *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 785 (2010) (emphasis in
original).

¹² *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

1 possessed by law-abiding citizens for lawful purposes.”¹³ These are the decisions this
2 Court is bound to apply. “It’s our duty as judges to interpret the Constitution based on
3 the text and original understanding of the relevant provision—not on public policy
4 considerations, or worse, fear of public opprobrium or criticism from the political
5 branches.”¹⁴

6 This case is about a California state law that makes it a crime to keep and bear
7 common firearm magazines typically possessed for lawful purposes. Based on the text,
8 history, and tradition of the Second Amendment, this law is clearly unconstitutional.

9 The detachable firearm magazine solved a problem with historic firearms: running
10 out of ammunition and having to slowly reload a gun.¹⁵ When more ammunition is
11 needed in case of confrontation, a larger the magazine is required. Many gun owners
12 want to have ready more than 10 rounds in their guns. As a result, in the realm of
13 firearms, magazines that hold more than 10 rounds are possibly the most commonly
14 owned thing in America. These larger magazines number over one hundred million. For
15 handguns, the most popular sizes range up to 17 rounds; the most popular size for rifles is
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20 ¹³ *Caetano v. Massachusetts*, 577 U.S. 411, 416 (Alito and Thomas concurring) (quoting
21 *Heller*, 554 U.S. at 625, in turn quoting *United States v. Miller*, 307 U.S. 174, 179
22 (1939)) (“We therefore read *Miller* to say only that the Second Amendment does not
23 protect those weapons not typically possessed by law-abiding citizens for lawful
24 purposes.”)

24 ¹⁴ *United States v. Rahimi*, 61 F.4th 443, 462 (5th Cir. 2023) (Ho, J., concurring)
(citations omitted).

25 ¹⁵ *United States v. Gonzalez*, 792 F. 3d. 534, 536–37 (5th Cir. 2015) (“The problem of
26 limited ammunition capacity has plagued rifles since their invention centuries ago. The
27 earliest rifles fired a single shot, leaving the user vulnerable during reloading. Numerous
28 inventions have sought to eliminate this problem. But from repeating rifles to clips, none
has proved as effective as the magazine.”) (citing David B. Kopel, *The History of
Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. R. 849 (2015)).

30 rounds. Yet, regardless of the overwhelming popularity of larger magazines, California continues to prohibit any magazine capable of holding more than 10 rounds.¹⁶

There is no American tradition of limiting ammunition capacity and the 10-round limit has no historical pedigree and it is arbitrary and capricious. It is extreme. Our federal government and most states impose no limits¹⁷ and in the states where limits are imposed, there is no consensus. Delaware landed on a 17-round magazine limit.¹⁸ Illinois and Vermont picked limits of 15 rounds for handguns and 10 rounds for a rifles.¹⁹ Colorado went with a 15-round limit for handguns and rifles, and a 28-inch tube limit for shotguns.²⁰ New York tried its luck at a 7-round limit; that did not work out.²¹ New Jersey started with a 15-round limit and then reduced the limit to 10-rounds.²² The fact

¹⁶ See Cal. Penal Code § 32310 and § 16740. The term “large-capacity magazine” is defined in California Penal Code § 16740 as “any ammunition feeding device with the capacity to accept more than 10 rounds,” but excludes: (a) a “feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds,” (b) a “.22 caliber tube ammunition feeding device,” and (c) a “tubular magazine that is contained in a lever-action firearm.”

¹⁷ Federal law imposes only a sentencing enhancement. United States Sentencing Guideline § 2K2.1(a)(4)(B) increases the base offense level for a violation of 18 U.S.C. § 922(g)(1) (felon in possession) when the offense involves a firearm with an attached magazine larger than 15 rounds. *United States v. Lucas*, No. 22-50064, 2023 U.S. App. LEXIS 14768, at *7 (9th Cir. June 14, 2023).

¹⁸ *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at *4 (D. Del. Mar. 27, 2023) (“‘Large-capacity magazine[s]’ are those ‘capable of accepting, or that can readily be converted to hold, more than 17 rounds of ammunition.’”).

¹⁹ 720 ILCS 5/24-1.10(a); Vt. Stat. Ann. tit. 13, § 4021.

²⁰ Colo. Rev. Stat. Ann. § 18-12-301.

²¹ The 7-round limit was found to be unconstitutional. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015).

²² “New Jersey once imposed a fifteen-round limit on magazine capacity. Now it claims a lower limit of ten is essential for public safety. The Second Amendment demands more than back-of-the-envelope math.” *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. AG N.J.*, 974 F.3d 237, 260 (3d Cir. 2020) (Matey, J. dissenting).

1 that there are so many different numerical limits demonstrates the arbitrary nature of
2 magazine capacity limits.

3 In a stealth return to the interest balancing test rejected by *Heller* and *Bruen*, the
4 State ostensibly justifies its magazine limits by deeming the smaller magazines “well-
5 suited” for its citizens.²³ Suitability, in turn, is based on concocted statistics about what a
6 hypothetical average person needs to defend against an attacker or attackers in an average
7 self-defense situation. Based on this hypothetical statistically average case scenario, the
8 State permits its citizen to have a gun, but the State decides the number of rounds in the
9 gun that it finds suitable.²⁴

11 ²³ At least a dozen times in its briefing before this Court, the State of California insists
12 magazines larger than 10 rounds are unsuitable. Here are some examples. “[T]he
13 Attorney General has demonstrated that LCMs are not necessary or even *suitable* to
14 engage in private self-defense.” Dkt. 145, at 9. “Nor are LCMs particularly *suitable* for
15 self-defense.” Dkt. 142, at 8. “[T]he accessory at issue here (an LCM) is not *well-suited*
16 for lawful self-defense.” *Id.*

17 ²⁴ And be grateful for 10 rounds. *Duncan*, 19 F.4th at 1168 n.10, *cert. granted, judgment*
18 *vacated*, 142 S. Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir.
19 2022) (Bumatay, J., dissenting) (“California currently allows more than 2.2 rounds in a
20 magazine, and does not prohibit carrying multiple magazines. But don’t be fooled.
21 Under the majority’s Version 2.2 of the Second Amendment, there is no reason a state
22 couldn’t limit its citizens to carrying a (generous) 3 rounds total for self-defense.”).

23 As this Court explained in its prior decision, “[a]rtificial limits will eventually lead
24 to disarmament. It is an insidious plan to disarm the populace and it depends on for its
25 success a subjective standard of ‘necessary’ lethality. It does not take the imagination of
26 Jules Verne to predict that if all magazines over 10 rounds are somehow eliminated from
27 California, the next mass shooting will be accomplished with guns holding only 10
28 rounds. To reduce gun violence, the state will close the newly christened 10-round
‘loophole’ and use it as a justification to outlaw magazines holding more than 7 rounds.
The legislature will determine that no more than 7 rounds are ‘necessary.’ Then the next
mass shooting will be accomplished with guns holding 7 rounds. To reduce the new gun
violence, the state will close the 7-round ‘loophole’ and outlaw magazines holding more
than 5 rounds determining that no more than 5 rounds are ‘suitable.’ And so it goes, until
the only lawful firearm law-abiding responsible citizens will be permitted to possess is a
single-shot handgun. Or perhaps, one gun, but no ammunition. Or ammunition issued
only to persons deemed trustworthy.” *Duncan*, 366 F. Supp. 3d at 1146 n.33.

1 In so doing, the State denies a citizen the federal constitutional right to use
2 common weapons of their own choosing for self-defense. There have been, and there
3 will be, times where many more than 10 rounds are needed to stop attackers.²⁵ Yet,

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6 ²⁵ Some have wishfully believed “there is no evidence that anyone ever has been unable
7 to defend his or her home and family due to the lack of a large-capacity magazine,” or
8 that more than 10 rounds is ever needed. But there is actually the evidence to support
9 this. In fact, the State’s own expert reports otherwise.

10 *See Duncan*, 366 F. Supp. 3d at 1134 (“As two masked and armed men broke in,
11 Susan Gonzalez was shot in the chest. She made it back to her bedroom and found her
12 husband’s .22 caliber pistol. Wasting the first rounds on warning shots, she then emptied
13 the single pistol at one attacker. Unfortunately, now out of ammunition, she was shot
14 again by the other armed attacker. She was not able to re-load or use a second gun. Both
15 she and her husband were shot twice. Forty-two bullets in all were fired. The gunman
16 fled from the house—but returned. He put his gun to Susan Gonzalez’s head and
17 demanded the keys to the couple’s truck.

18 When three armed intruders carrying what look like semi-automatic pistols broke
19 into the home of a single woman at 3:44 a.m., she dialed 911. No answer. Feng Zhu
20 Chen, dressed in pajamas, held a phone in one hand and took up her pistol in the other
21 and began shooting. She fired numerous shots. She had no place to carry an extra
22 magazine and no way to reload because her left hand held the phone with which she was
23 still trying to call 911. After the shooting was over and two of the armed suspects got
24 away and one lay dead, she did get through to the police. The home security camera
25 video is dramatic.

26 A mother, Melinda Herman, and her nine-year-old twins were at home when an
27 intruder broke in. She and her twins retreated to an upstairs crawl space and hid.
28 Fortunately, she had a .38 caliber revolver. She would need it. The intruder worked his
way upstairs, broke through a locked bedroom door and a locked bathroom door, and
opened the crawl space door. The family was cornered with no place to run. He stood
staring at her and her two children. The mother shot six times, hitting the intruder five
times, when she ran out of ammunition. Though injured, the intruder was not
incapacitated. Fortunately, he decided to flee.”) (Citations omitted).

More examples have been reported since those words were written. When four
suspects in a stolen car with stolen guns and ammunition used stolen house keys to enter
the victims’ home in Tallahassee, Florida at 3:37 a.m., the victim fired 25 rounds before
the suspects retreated out of the home. *Police: Tallahassee homeowner shot 2 out of 4
home invasion suspects, all 4 charged*, ABC27 WTXL (May 24, 2019)
<https://www.wtxl.com/news/local-news/tpd-investigating-home-invasion-robbery>
[\[https://perma.cc/AQ36-S2ZH\]](https://perma.cc/AQ36-S2ZH).

1 under this statute, the State says “too bad.” It says, if you think you need more than 10
2 chances to defend yourself against criminal attackers, you must carry more magazines.
3 Or carry more bullets to hand reload and fumble into your small magazine while the
4 attackers take advantage of your pause. On the other hand, you can become a criminal,
5 too. So, the previously law-abiding California citizen who buys and keeps at her bedside
6 a nationally popular Glock 17 (with its standard 17-round magazine) becomes the
7 criminal, because the State dictates that a gun with a 17-round magazine is not well-
8 suited for home defense.²⁶

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16 In Kentucky, when a home intruder wearing a bulletproof vest shot and killed one
17 daughter asleep in her bed, the father awoke and needed to fire 11 shots from one gun and
18 8 shots from a second gun, while suffering 3 gunshot wounds himself, to protect his other
19 daughter, his wife, and himself. Krista Johnson and Hayes Gardner, *Jordan Morgan’s*
20 *death: Suspect Shannon Gilday arrested in Madison County*, Louisville Courier J. (Feb.
21 28, 2022), [https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-](https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/)
22 [arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/](https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/) [[https://perma.cc/Q49M-](https://perma.cc/Q49M-ZFF9)
23 [ZFF9](https://perma.cc/Q49M-ZFF9)].

24 On a Chicago train this year, a citizen was robbed at gunpoint by a suspect who
25 had been previously arrested 32 times. The victim, a bank security guard, shot back 18
26 times (4 of the rounds jammed) before the suspect retreated off the train. *Arrested 32*
27 *times since 2014, man allegedly engaged in a ‘firefight’ with a concealed carry holder on*
28 *a CTA train*, CWBChicago (Jan. 22, 2023), [https://cwbchicago.com/2023/01/arrested-32-](https://cwbchicago.com/2023/01/arrested-32-times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html)
[times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-](https://cwbchicago.com/2023/01/arrested-32-times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html)
[on-a-cta-train.html](https://cwbchicago.com/2023/01/arrested-32-times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html) [<https://perma.cc/EAV2-8F2E>].

²⁶ Criminals sometimes do not abide by gun regulations and pass around “gang guns”
with magazines larger than 10 rounds. See, e.g., *People v. Cyrus*, No. E075271, 2023
Cal. App. Unpub. LEXIS 1301, at *5 (Mar. 3, 2023) (describing a Glock .40 cal. handgun
and 29-round magazine and explaining, “[a] ‘gang gun’ is a gun that is passed around the
gang and used by numerous gang members to commit crimes.).

1 Numbers vary, but some estimate that 81 million Americans own between 415²⁷
2 and 456²⁸ million firearms. Further, millions of Americans across the country own large
3 capacity magazines. “One estimate . . . shows that . . . civilians possessed about 115
4 million LCMs out of a total of 230 million magazines in circulation. Put another way,
5 half of all magazines in America hold more than 10 rounds.”²⁹ A more recent large-scale
6 survey estimates that Americans today own 542 million rifle and handgun magazines that
7 hold more than 10 rounds.³⁰ Home defense and target shooting are the two most
8 common reasons for owning these larger magazines.³¹ Moreover, the survey reports 48%
9 of gun owners have owned a handgun or rifle magazine that holds more than 10 rounds.³²
10 But California bans these typically possessed magazines kept and used for self-defense.

11 Why are larger magazines chosen for self-defense? Crime happens a lot. One
12 recent estimate holds that guns are needed defensively approximately 1,670,000 times a
13 year.³³ Another report, originally commissioned and long cited by the Centers for
14 Disease Control and Prevention estimated that there are between 500,000 and 3,000,000
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17 ²⁷ William English, *2021 National Firearms Survey: Updated Analysis Including Types*
18 *of Firearms Owned* 7 (Geo. McDonough Sch. of Bus. Rsch. Paper No. 4109494, 2022),
19 available at <https://ssrn.com/abstract=4109494> [<https://perma.cc/83XT-75YG>].

20 ²⁸ See Suppl. Decl. of Louis Klarevas, Dkt. 137-5 (“Suppl. Klarevas Decl.”), at ¶ 15 and
21 n.13.

22 ²⁹ *Duncan*, 970 F.3d at 1142, *reh’g en banc granted, opinion vacated*, 988 F.3d 1209 (9th
23 Cir. 2021), *and on reh’g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir.
24 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), *and vacated and*
25 *remanded*, 49 F.4th 1228 (9th Cir. 2022).

26 ³⁰ English, *supra*, at 25 (“These estimates suggest that Americans have owned some 542
27 million rifle and handgun magazines that hold over 10 rounds.”). Plaintiff’s expert,
28 Stephen Helsley, a retired California Department of Justice Assistant Director of the
Division of Law Enforcement, estimates there are between 500 million and one billion
magazines able to hold more than 10 rounds. See Declaration of Helsley in Support of
Plfs.’ Suppl. Br., Exh. 10, Dkt. 132-4, at ¶ 11.

³¹ English, *supra*, at 23.

³² *Id.* at 22.

³³ *Id.* at 35.

1 defensive gun uses in the United States every year.³⁴ Woe to the victim who runs out of
2 ammunition before armed attackers do. The police will mark the ground with chalk,
3 count the number of shell casings, and file the report.

4 All of this was decided earlier.

5 What remains to be done? California Penal Code § 32310 must be assessed in
6 light of *Bruen*. Now, on remand, the State has to justify this ban under *Bruen*, which
7 makes clear that “[t]o justify its regulation, the government may not simply posit that the
8 regulation promotes an important interest.”³⁵ After all, “the very enumeration of the
9 right takes out of the hands of government—even the Third Branch of Government—the
10 power to decide on a case-by-case basis whether the right is really worth insisting
11 upon.”³⁶ So, the State must demonstrate that its extreme ban is consistent with this
12 Nation’s historical tradition of firearms regulation. As explained below, there is no
13 national tradition of prohibiting or regulating firearms based on firing capacity or
14 ammunition capacity.

15 **II. CONSTITUTIONAL STANDARDS**

16 The Second Amendment provides: “A well regulated Militia, being necessary to
17 the security of a free State, the right of the people to *keep and bear* Arms, shall not be
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20 ³⁴ See Inst. of Med. & Nat’l Rsch. Council, *Priorities for Research to Reduce the Threat*
21 *of Firearm-Related Violence* 15 (The Nat’l Acads. Press ed., 2013),
22 <https://doi.org/10.17226/18319> [<https://perma.cc/K3N4-FEXQ>]. For many years the
23 CDC’s “fast facts” webpage referred to this report. The report itself had two different
24 ranges. The second range estimated from 60,000 to 2,500,000 annual defensive gun uses
25 in America. See Internet Archive Wayback Machine, CDC Firearm Violence Prevention,
26 captured July 26, 2021,
27 [https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/fi](https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/firearms/fastfact.html)
28 [rearms/fastfact.html](https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/firearms/fastfact.html). The Court notes that the CDC has changed its reporting to delete
reference to this study and the Court will not comment on how or why that happened as
the CDC website does not reflect why it was deleted.

³⁵ *Bruen*, 142 S. Ct. at 2126.

³⁶ *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

1 infringed.”³⁷ “[T]he Second Amendment extends, prima facie, to all instruments that
2 constitute bearable arms, even those that were not in existence at the time of the
3 founding.”³⁸ According to *Heller*, “[t]he Second Amendment is naturally divided into
4 two parts: its prefatory clause and its operative clause. The former does not limit the
5 latter grammatically, but rather announces a purpose. The Amendment could be
6 rephrased, ‘Because a well regulated Militia is necessary to the security of a free State,
7 the right of the people to keep and bear Arms shall not be infringed.’”³⁹ “The first salient
8 feature . . . is that it codifies a ‘right of the people.’”⁴⁰ *Heller* then examines the
9 substance of the constitutional right, the verbs *to keep* and *to bear* and their object: *arms*.
10 So, what does it mean to keep and bear arms?

11 The Supreme Court concludes, “[t]he 18th-century meaning [of “arms”] is no
12 different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary
13 defined ‘arms’ as ‘weapons of offence, or armour of defence.’ Timothy Cunningham’s
14 important 1771 legal dictionary defined ‘arms’ as ‘any thing that a man wears for his
15 defence, or takes into his hands, or useth in wrath to cast at or strike another.’”⁴¹ In the
16 past, the term “arms” included weapons that were not specifically designed for military
17 use and were not employed in a military capacity. “Although one founding-era thesaurus
18 limited ‘arms’ . . . to ‘instruments of offence generally made use of in war,’ even that
19 source stated that all firearms constituted ‘arms,’” according to *Heller*.⁴² And it is now
20 clear that “the Second Amendment extends, prima facie, to all instruments that constitute
21 bearable arms, even those that were not in existence at the time of the founding.”⁴³
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24 ³⁷ U.S. Const. amend. II (emphasis added).

25 ³⁸ *Caetano*, 577 U.S. 411 (quoting *Heller*, 554 U.S. at 581).

26 ³⁹ *Heller*, 554 U.S. at 577 (citations omitted).

27 ⁴⁰ *Heller*, 554 U.S. at 579.

28 ⁴¹ *Heller*, 554 U.S. at 581 (citations omitted).

⁴² *Heller*, 554 U.S. at 581 (citations omitted).

⁴³ *Heller*, 554 U.S. at 582.

1 *Heller* later describes the types and kinds of arms that are guaranteed Second
2 Amendment protection. But first, *Heller* describes the meanings of “to keep” and “to
3 bear” arms.

4 “We turn to the phrases ‘keep arms’ and ‘bear arms.’ Johnson defined ‘keep’ as,
5 most relevantly, ‘to retain; not to lose,’ and ‘to have in custody.’ Webster defined it as
6 ‘to hold; to retain in one’s power or possession’ . . . Thus the most natural reading of
7 ‘keep Arms’ in the Second Amendment is to ‘have weapons.’”⁴⁴ “Keep arms,” according
8 to *Heller*, “was simply a common way of referring to possessing arms, for militiamen and
9 everyone else.”⁴⁵ “To bear” meant to carry for the purpose of being armed and ready in
10 case of conflict with another person. *Heller* even cited with approval the meaning of the
11 phrase “carries a firearm” proposed by Justice Ginsburg in *Muscarello v. United States*:
12 “as the Constitution’s Second Amendment indicates: ‘wear, bear, or carry upon the
13 person or in the clothing or in a pocket, for the purpose of being armed and ready for
14 offensive or defensive action in a case of conflict with another person.’”⁴⁶ Providing our
15 modern understanding of the Second Amendment’s text, *Heller* concludes, “[p]utting all
16 of these textual elements together, we find that they *guarantee the individual right to*
17 *possess and carry weapons in case of confrontation*.”⁴⁷

18 Very important in the past, still important in the future, *Heller* describes the
19 concept of America’s militia. “In *Miller*, we explained that ‘the Militia comprised all
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22 ⁴⁴ *Heller*, 554 U.S. at 582 (citations omitted).

23 ⁴⁵ *Heller*, 554 U.S. at 583.

24 ⁴⁶ *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. 125, 143 (1998) (Ginsburg, J.
dissenting).

25 ⁴⁷ *Heller*, 554 U.S. at 592 (emphasis added). “As the most important early American
26 edition of Blackstone’s Commentaries (by the law professor and former Antifederalist St.
27 George Tucker) made clear in the notes to the description of the arms right, Americans
28 understood the ‘right of self-preservation’ as permitting a citizen to ‘repel force by force’
when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Id.*
at 595 (quoting 1 Blackstone’s Commentaries, 145-46, n.42 (1803)).

1 males physically capable of acting in concert for the common defense.”⁴⁸ And *Heller*
2 explains why the militia was important. Two of the three reasons remain important
3 today. “There are many reasons why the militia was thought to be ‘necessary to the
4 security of a free State.’ First, of course, it is useful in repelling invasions and
5 suppressing insurrections. . . . Third, when the able-bodied men of a nation are trained in
6 arms and organized, they are better able to resist tyranny.”⁴⁹ Once one understands the
7 history of tyrants resorting to taking away people’s arms to suppress political opposition,
8 *Heller* explains, one can see that the militia clause fits perfectly with the operative clause.
9 *Heller* teaches,

10 We reach the question, then: Does the preface fit with an
11 operative clause that creates an individual right to keep and bear
12 arms? It fits perfectly, once one knows the history that the
13 founding generation knew and that we have described above.
14 That history showed that the way tyrants had eliminated a
15 militia consisting of all the able-bodied men was not by
16 banning the militia but simply by taking away the people’s
17 arms, enabling a select militia or standing army to suppress
18 political opponents. This is what had occurred in England that
19 prompted codification of the right to have arms in the English
20 Bill of Rights.⁵⁰

21 While the protection of a citizen militia was important, most people regarded the
22 Second Amendment as even more important for its protection of self-defense and
23 hunting. “The prefatory clause does not suggest that preserving the militia was the only
24 reason Americans valued the ancient right; *most undoubtedly thought it even more*
25 *important for self-defense and hunting.*”⁵¹ After all, “[t]he right to self defence is the
26 first law of nature: in most governments it has been the study of rulers to confine the right

27 ⁴⁸ *Heller*, 554 U.S. at 595.

28 ⁴⁹ *Heller*, 554 U.S. at 598 (citations omitted).

⁵⁰ *Heller*, 554 U.S. at 598.

⁵¹ *Heller*, 554 U.S. at 599 (emphasis added).

1 within the narrowest limits possible. Wherever standing armies are kept up, and the right
2 of the people to keep and bear arms is, under any colour or pretext whatsoever,
3 prohibited, liberty, if not already annihilated, is on the brink of destruction.”⁵² As one
4 commentator wrote at the time the Fourteenth Amendment was adopted in 1868, “[t]he
5 purpose of the Second Amendment is to secure a well-armed militia. . . . But a militia
6 would be useless unless the citizens were enabled to exercise themselves in the use of
7 warlike weapons.”⁵³ In this way, a general public knowledge and skill with weapons of
8 war is beneficial to the nation at large and is protected by the Second Amendment. “No
9 doubt, a citizen who keeps a gun or pistol under judicious precautions, practices in safe
10 places the use of it, and in due time teaches his sons to do the same, exercises his
11 individual right.”⁵⁴ And “[t]he right to bear arms has always been the distinctive privilege
12 of freemen.”⁵⁵ In the end, the Supreme Court deems the Second Amendment as valuable
13 for both preserving the militia and for self-defense – which is the heart of the right.

14 *McDonald* put it this way:

15 In *Heller*, we recognized that the codification of this right was
16 prompted by fear that the Federal Government would disarm
17 and thus disable the militias, but we rejected the suggestion that
18 the right was valued only as a means of preserving the militias.
19 On the contrary, we stressed that the right was also valued
20 because the possession of firearms was thought to be essential
21 for self-defense. As we put it, self-defense was “the
22 central component of the right itself.”⁵⁶

23 ⁵² *Heller*, 554 U.S. at 606 (citation omitted).

24 ⁵³ *Heller*, 554 U.S. at 618 (quoting J. Pomeroy, *An Introduction to the Constitutional Law*
25 *of the United States* §239, pp. 152-153 (1868)).

26 ⁵⁴ *Heller*, 554 U.S. at 619 (quoting B. Abbott, *Judge and Jury: A Popular Explanation of*
27 *the Leading Topics in the Law of the Land* 333 (1880)).

28 ⁵⁵ *Heller*, 554 U.S. at 619 (quoting J. Ordronaux, *Constitutional Legislation in the United*
States 241-242 (1891)).

⁵⁶ *McDonald*, 561 U.S. at 926-27.

1 *Heller* specifically considered “whether a District of Columbia prohibition on the
2 possession of *usable* handguns in the home violates the Second Amendment to the
3 Constitution.”⁵⁷ And “District of Columbia law also require[d] residents to keep their
4 lawfully owned firearms, such as registered long guns, ‘unloaded and disassembled or
5 bound by a trigger lock or similar device’ unless they are located in a place of business or
6 are being used for lawful recreational activities.”⁵⁸ In the end, the Supreme Court struck
7 down both parts of the statute. “In sum, we hold that the District’s ban on handgun
8 possession in the home violates the Second Amendment, as does its prohibition against
9 rendering any lawful firearm in the home operable for the purpose of immediate self-
10 defense.”⁵⁹ While reaching its conclusion, the Supreme Court considered what types of
11 firearms were, and were not, protected by the Constitution. Highlighting the central
12 tenant of the Second Amendment, the Supreme Court wrote,

13 We may as well consider at this point (for we will have to
14 consider eventually) what types of weapons *Miller* permits.
15 Read in isolation, *Miller*’s phrase “part of ordinary military
16 equipment” could mean that only those weapons useful in
17 warfare are protected. That would be a startling reading of the
18 opinion, since it would mean that the National Firearms Act’s
19 restrictions on machineguns (not challenged in *Miller*) might be
20 unconstitutional, machineguns being useful in warfare in 1939.
21 We think that *Miller*’s “ordinary military equipment” language
22 must be read in tandem with what comes after: “Ordinarily
23 when called for militia service able-bodied men were expected
24 to appear bearing arms supplied by themselves and of the kind
25 in common use at the time.” The traditional militia was formed
26 from a pool of men bringing arms “in common use at the time”
27 for lawful purposes like self-defense. “In the colonial and
28 revolutionary war era, small-arms weapons⁶⁰ used by

25 ⁵⁷ *Heller*, 554 U.S. at 573 (emphasis added).

26 ⁵⁸ *Heller*, 554 U.S. at 575. The Court declared both aspects of the statute to be in
27 violation of the Second Amendment.

28 ⁵⁹ *Heller*, 554 U.S. at 635.

⁶⁰ Not cannons or mortars.

1 militiamen and weapons used in defense of person and home
2 were one and the same.” . . . We therefore read *Miller* to say
3 only that the Second Amendment does not protect those
4 weapons not typically possessed by law-abiding citizens for
lawful purposes.⁶¹

5 Since it was “the conception of the militia at the time of the Second Amendment’s
6 ratification [that] the body of all citizens capable of military service, [citizens] would
7 bring the sorts of lawful weapons that they possessed at home to militia duty,”⁶² the right
8 to keep and carry arms means “the sorts of weapons protected were those ‘in common
9 use at the time.’”⁶³

10 **A. Magazines Are Protected “Arms”**

11 The State argues that larger capacity magazines are not “arms.” First, the State
12 argues that magazines are not essential to the use of firearms and consequently would
13 have been thought of as accessories. But magazines are “integral components to vast
14 categories of guns.” *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1276 (N.D. Cal.
15 2014), *aff’d sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015). “Most pistols
16 are manufactured with magazines holding ten to seventeen rounds, and many popular
17 rifles are manufactured with magazines holding twenty or thirty rounds.” *Kolbe v.*
18 *Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (*en banc*). While the Second Amendment does
19 not explicitly mention ammunition or magazines supplying ammunition, “without bullets,
20 the right to bear arms would be meaningless.”⁶⁴ This is because the right to keep firearms
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25 ⁶¹ *Heller*, 554 U.S. at 624-25 (citations omitted). If it existed at the time and were in
26 common use, as it is today, would a militia member bring a firearm with a magazine that
holds more than 10 rounds? The answer is, yes, of course.

27 ⁶² *Heller*, 554 U.S. at 627.

28 ⁶³ *Heller*, 554 U.S. at 627 citation omitted).

⁶⁴ *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)

1 for protection implies a corresponding right to obtain the bullets necessary to use them.
2 “The possession of arms also implied the possession of ammunition.”⁶⁵

3 By extension, “arms” includes the magazine component necessary to supply the
4 bullet into the chamber of the gun. “[O]ur case law supports the conclusion that there
5 must also be some corollary, albeit not unfettered, right to possess the magazines
6 necessary to render those firearms operable.”⁶⁶ “It is hard to imagine something more
7 closely correlated to the right to use a firearm in self-defense than the ability to
8 effectively load ammunition into the firearm.”⁶⁷

9 Put more broadly, “the Second Amendment protects ancillary rights necessary to
10 the realization of the core right to possess a firearm for self-defense.”⁶⁸ Consequently,
11 whether thought of as a firearm able to fire a certain number of rounds because of its
12 inserted magazine, or as a separate ammunition feeding component, magazines are usable
13 “arms” within the meaning of the Second Amendment. As the Third Circuit Court of
14 Appeals found, “[w]e therefore must first determine whether the regulated item is an arm
15 under the Second Amendment. The law challenged here regulates magazines, and so the
16 question is whether a magazine is an arm under the Second Amendment. The answer is
17 yes.”⁶⁹

18 Proffering two subsidiary arguments, the State says: (1) a magazine of some size
19 may be necessary, but a magazine larger than 10 rounds is not necessary to operate a
20 firearm and thus a larger magazine is not a protected “arm”; and (2) statistically people
21 rarely fire more than 10 rounds in self-defense so it can be said that a magazine larger
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25 ⁶⁵ *United States v. Miller*, 307 U.S. 174, 180 (1939).

26 ⁶⁶ *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015)

27 ⁶⁷ *Barnett v. Raoul*, 2023 U.S. Dist. LEXIS 74756, *26 (S.D. Ill. Apr. 28, 2023).

28 ⁶⁸ *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017).

⁶⁹ *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. of N.J.*, 910 F.3d 106, 116 (3d Cir. 2018).

1 than 10 rounds is rarely *used* for self-defense, and if a larger magazine is not commonly
2 *used* for self-defense then it is not a protected “arm.”

3 For the first argument, the State claims that if a standard 17-round magazine is
4 detached from a standard Glock 17 pistol, the 17-round magazine is no longer a weapon
5 (by itself) and because the Glock 17 pistol could still function with a substitute 10-round
6 magazine, then the 17-round standard Glock magazine does not come within the
7 definition of “arms” that the Second Amendment protects.⁷⁰ In contrast, according to the
8 State, a magazine holding 10 or less may qualify as a protected “arm,” but a magazine
9 able to hold 11 or more is not a protected “arm.” What the State seems to be really
10 saying is that a magazine may be a protected arm, but only the State has the right to pick
11 the number of rounds a citizen may have in his gun.

12 This Court disagrees. The Supreme Court has not described protected arms in
13 subdivided categories. When *Heller* found handguns were protected, it did not
14 distinguish between semiautomatic pistols and revolvers. *Heller* did not classify
15 protected handguns according to the number of rounds one could hold or the caliber of
16 the ammunition that could be fired. It did not suggest that typically possessed arms could
17 be subcategorized and subjected to judicial ad hoc constitutional determinations.
18 Whether thought of holistically as a “handgun” irrespective of magazine size as *Heller*
19 does, or as an entirely separate attachment, both firearms and their magazines (of all
20 typical sizes) are “arms” covered by the text of the Second Amendment. “This is not
21 even a close call.”⁷¹ As this Court has said before, “[n]either magazines, nor rounds of
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23 ⁷⁰ Of course, the argument admits, *sub silentio*, that some magazines are necessary to
24 operate a gun. The State says: “To be sure, some type of magazine is essential to the use
25 of many handguns. But there is no evidence in this record . . . that a magazine capable of
26 firing more than 10 rounds without reloading is necessary to the function of any modern
27 firearm.” Def’s Suppl. Br., Dkt. 118 at n.10.

28 ⁷¹ *Barnett v. Raoul*, No. 3:23-cv-00209-SPM, 2023 U.S. Dist. LEXIS 74756, at *26–27
(S.D. Ill. Apr. 28, 2023); *Hanson v. District of Columbia*, Civil Action No. 22-2256
(RC), 2023 U.S. Dist. LEXIS 68782, at *17 (D.D.C. Apr. 20, 2023) (“At least three

ammunition, nor triggers, nor barrels are specifically mentioned in the Second Amendment . . . But without a right to keep and bear triggers, or barrels, or ammunition and the magazines that hold ammunition, the Second Amendment right would be meaningless.”⁷² Using reasoning that is still persuasive, the Ninth Circuit agreed, explaining “[p]ut simply, a regulation cannot permissibly ban a protected firearm’s components critical to its operation.” More recently, counsel for California’s Governor in a related fee-shifting case agreed while pointing out that “[t]he large-capacity magazines ban appears in the Penal Code’s title on ‘Firearms,’” and “a restriction on the ammunition that may be used in a firearm is a restriction on firearms.”⁷³ Leaving no doubt, even the (vacated) Ninth Circuit’s *en banc* decision assumed that § 32310 implicates the Second Amendment.⁷⁴

Relatedly, the State argues that it is only restricting a firearm component or an accessory.⁷⁵ “LCMs are not weapons in themselves,” says the State, “nor are they

Courts of Appeals have concluded that LCMs are “arms” within the meaning of the Second Amendment.”); *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at *19 (D. Del. Mar. 27, 2023); *contra, Ocean State Tactical, LLC v. Rhode Island*, No. 22-cv-246 JJM-PAS, 2022 U.S. Dist. LEXIS 227097, at *33–34 (D.R.I. Dec. 14, 2022); *Or. Firearms Fed’n, Inc. v. Brown*, No. 2:22-cv-01815-IM, 2022 U.S. Dist. LEXIS 219391, at *23–25 (D. Or. Dec. 6, 2022).

⁷² *Duncan*, 366 F. Supp. 3d at 1142–43 (citing *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015); *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc); *Ass’n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018).

⁷³ *Miller v. Bonta*, 22cv1446-BEN (JLB), Intervenor-Def’s Suppl. Br., Dkt. 35, at 14.

⁷⁴ *Duncan*, 19 F.4th at 1103, *cert. granted, judgment vacated*, 213 L. Ed. 2d 1109, 142 S. Ct. 2895 (2022).

⁷⁵ Instead of isolating the magazine from the gun, the better understanding is to consider the magazine as part of the gun. There is a federal law analogue leading to the conclusion that a magazine is correctly regarded as a component part of a gun. The Arms Control Export Act criminalizes the unlicensed export of firearms and their components. 22 U.S.C. § 2778(b). Firearm magazines come within the Act because “a magazine is ‘useful’ only when used in conjunction with that end-item [a rifle]: its sole purpose is to load cartridges into the breech so that they can be fired”⁷⁵ In this view, the

1 necessary to operate any firearm for self-defense.” California residents who purchased
2 new pistols in the last decade are probably surprised to hear that magazines are not
3 necessary to operate a pistol. After all, another state law known as the Unsafe Handgun
4 Act requires new semiautomatic pistols to have an integrated magazine-disconnect
5 mechanism in order to be sold to the public.⁷⁶

6 A magazine-disconnect mechanism prevents a pistol from firing at all, even if one
7 round is left loaded in the chamber, if the magazine is not inserted into the pistol. The
8 state-mandated magazine-disconnect mechanism thus prevents the operation of the
9 firearm without its magazine.⁷⁷ While rifles are not required to have a magazine-
10 disconnect mechanism, the State must concede that at least for semiautomatic handguns
11 the State deems “not unsafe,” firearms for self-defense will not function without a
12 magazine.⁷⁸ Modern magazines, submits the State, are more like founding-era cartridge
13 boxes or “ancillary equipment associated with soldiering” that were not strictly necessary
14 to fire a gun. Today, however, as pointed out above, some semiautomatic firearms will
15 not function at all without a magazine, while others can fire no more than one round. As
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19 magazine is a necessary component part of a gun which, in turn, would obviously fall
20 under the text of the Second Amendment protection of “arms.”

21 ⁷⁶ “California’s Unsafe Handgun Act (the ‘UHA’) seeks to prevent accidental discharges
22 by requiring handguns to have particular safety features . . . [t]he UHA requires certain
23 handguns to have a magazine disconnect mechanism (“MDM”), which prevents a
24 handgun from being fired if the magazine is not fully inserted.” *Boland v. Bonta*, No.
25 SACV2201421CJCADSX, 2023 WL 2588565, at *1 (C.D. Cal. Mar. 20, 2023) (citing
26 Cal. Penal Code §§ 16900, 31910(b)(5)).

27 ⁷⁷ Semiautomatic pistols elsewhere in the nation usually do not have a magazine-
28 disconnect mechanism so a pistol can still fire one chambered round without its
magazine. Of course, one need not go too far out on a limb to say that a semi-automatic
pistol that can fire only 1-round is not the sort of self-defense weapon most people would
choose.

⁷⁸ To be precise, revolvers are handguns that do not require a magazine-disconnect
mechanism, but that is because a revolver does not have a detachable magazine.

1 such, a magazine is an essential component without which a semiautomatic firearm is
2 useless for self-defense. Therefore, a magazine falls within the meaning of “arms.”⁷⁹

3 **B. LCMs Are Used for Self-Defense**

4 Notwithstanding that the Second Amendment protects the right to “keep and bear,”
5 the State’s more troubling argument is that magazines holding more than 10 rounds are
6 not being *used* for self-defense. By “used,” the State means actually fired. The State
7 asserts, “there is no evidence that LCMs are frequently used in self-defense.”
8 Continuing, the State asserts, “[t]o the contrary, the record reflects that it is exceedingly
9 rare for an individual, in a self-defense situation, to fire more than ten rounds.” But
10 without conceding the accuracy of the State’s position, infrequent use or “exceedingly
11 rare” is not the same as *never*. To support the State’s argument, it relies on a
12 statistician’s conclusion that an average of only 2.2 rounds are fired in an average self-
13 defense situation. Because more than 10 rounds in the average situation are not being
14 fired for self-defense, the argument goes, magazines holding more than 10 rounds are not
15 *used* or needed for self-defense. And because the Second Amendment protects
16 (according to the State) only those arms commonly “used” for self-defense, the State says
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19 ⁷⁹ See e.g., *Hanson v. D.C.*, No. CV 22-2256 (RC), 2023 WL 3019777, at *7 (D.D.C.
20 Apr. 20, 2023) (“The District’s logic, by contrast, would allow it to ban *all* magazines
21 (not just LCMs) — a result even the District does not endorse here — because a firearm
22 technically does not require *any* magazine to operate; one could simply fire the single
23 bullet in the firearm’s chamber. The Court will therefore follow the persuasive reasoning
24 of *ANJRPC*, *Kolbe*, and *Duncan* in concluding that LCMs are “arms” within the meaning
25 of the Second Amendment.”); see also *Barnett v. Raoul*, No. 3:23-CV-00141-SPM, 2023
26 WL 3160285, at *8 (S.D. Ill. Apr. 28, 2023) (“Defendants’ argument is not persuasive.
27 The Seventh Circuit has recognized the Second Amendment as extending to “corollaries
28 to the meaningful exercise of the core right to possess firearms for self-defense.” It is
hard to imagine something more closely correlated to the right to use a firearm in self-
defense than the ability to effectively load ammunition into the firearm.”).

larger capacity magazines are not commonly “used,” and therefore they are not protected arms.⁸⁰

It is a remarkable reading of *Heller*, *McDonald*, *Caetano*, and *Bruen* to say that if a gun is not fired more than 10 times in self-defense then the gun’s larger magazine is not being “used” in self-defense, and if not “used” in self-defense, then not protected by the Second Amendment. Yet, this is the State’s theme.

In this Court’s view, it is a crabbed reading of the Supreme Court’s Second Amendment decisions and not relevant to the text, history and tradition test. The Supreme Court uses several descriptive phrases to describe the kinds of firearms that are protected by the Constitution. But common to all is the notion that to be protected, an arm needs only to be regarded as *typically* possessed or carried, or *commonly* kept, by citizens to be ready for use, if needed. The Supreme Court has not said that the actual firing of a gun is any part of the test. Indeed, the Second Amendment does not say that the right of the People to keep only such firearms as they actually shoot, shall not be infringed.

McDonald begins, “[t]wo years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms *for the purpose of self-defense*, and we struck down a District of Columbia law that banned the possession of handguns in the home.”⁸¹ What mattered is the purpose for which handguns were possessed, not necessarily the actual use.

⁸⁰ A similar argument was made by the State in *N.A. for Gun Rights v. Lamont*, Case No. 22-1118 (JBA), 2023 U.S. Dist. LEXIS 134880, *40 (D. Conn. Aug. 3, 2023) (“Defendants maintain that after *Bruen*, Plaintiffs must show not only that the weapons and accoutrements are commonly owned, but they are commonly possessed and used *for self-defense* base on *Bruen*’s repeated use of the phrase ‘common use’ for self-defense.”) (emphasis added), and in *Oregon Firearms Federation v. Kotek*, Case No. 22cv1815-IM, *67 (D. Ore. July 14, 2023) (“Defendants ... argue for an interpretation of ‘use’ that includes some objective metric of an LCM’s actual use in self-defense.”).

⁸¹ 561 U.S. at 749-50 (citation omitted) (emphasis added).

1 The State puts its weight on the words “use,” “uses,” and “used.” One problem
2 with the State’s view is that it treats the Supreme Court’s opinion language like the
3 language of a statute. That is a mistake. “Because ‘opinions, unlike statutes, are not
4 usually written with the knowledge or expectation that each and every word may be the
5 subject of searching analysis,’ we do not follow statutory canons of construction with
6 their focus on ‘textual precision’ when interpreting judicial opinions.”⁸²

7 Under the State’s reading, a homeowner who displays a handgun with a 17-round
8 magazine to scare away home invaders, has not “used” the 17-round magazine. Under
9 the State’s reading, even a citizen who fires his semiautomatic firearm 10 times or less to
10 defend himself, has not *used* his 17-round magazine in self-defense. Admittedly, one can
11 find different meanings of the term “use.” For example, in the context of a criminal
12 statute, the Supreme Court acknowledged “use” offers different possible meanings.
13 “[T]he word ‘use’ poses some interpretational difficulties because of the different
14 meanings attributable to it. Consider the paradoxical statement: ‘I *use* a gun to protect
15 my house, but I’ve never had to *use* it.’”⁸³ Consequently, context is important, whether
16 interpreting a statute or understanding an opinion.⁸⁴

17 So, considering the words “use” or “used” in context, the State’s notion is far
18 removed from the meaning indicated by the Supreme Court. *Heller* considered merely
19 the simple possession of *usable* handguns in the home. Focusing on the right to possess a
20 usable arm, *Heller* said, “[w]e consider whether a District of Columbia prohibition on the
21 possession of *usable* handguns in the home violates the Second Amendment to the
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25 ⁸² *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766, 770 (9th Cir.
26 2023) (citations omitted).

27 ⁸³ *Bailey v. United States*, 516 U.S. 137, 143 (1996) (emphasis in original).

28 ⁸⁴ *Muscarello v. United States*, 524 U.S. 125, 144 (1998) (“Noting the paradoxical
statement, ‘I *use* a gun to protect my house, but I’ve never had to *use* it,’ the Court in
Bailey emphasized the importance of context.”)

1 Constitution.”⁸⁵ Actual firing of a handgun in the District was irrelevant. Statistical
2 surveys of shots fired in self-defense were not determinative – they were not even
3 mentioned. *Heller* used a simpler test. Constitutional protection is afforded to weapons
4 “typically possessed by law-abiding citizens for lawful purposes,” focusing on typicality
5 and possession rather than frequency of firing.⁸⁶

6 *McDonald* says “the right was also valued because the possession of firearms was
7 thought to be essential for self-defense.” *McDonald*’s focus is on possession.⁸⁷ And
8 *McDonald* says the right applies “to handguns because they are ‘the most preferred
9 firearm in the nation to ‘keep’ and use for protection of one’s home and family,’”
10 focusing on a national subjective preference for handguns.⁸⁸ There was no effort by the
11 Supreme Court to condition the constitutional right upon some objective metric of actual
12 handgun firing in self-defense.

13 *Bruen* says, “[t]he Second Amendment guaranteed to ‘all Americans’ the right to
14 bear commonly used arms in public.” *Bruen* appears to focus on commonality.⁸⁹ *Bruen*
15 injects some ambiguity with the following phraseology, “the Second Amendment
16 protects the possession and use of weapons that are ‘in common use at the time.’”⁹⁰
17 *Bruen* noted that in that case, no party disputed that handguns are weapons “in common
18 use” today for self-defense, but did not say what it meant by “use.”⁹¹ So, what does the
19 Supreme Court mean by its phrase “in common use?” Is the focus placed on a weapon’s
20 commonality in society or the frequency of a weapon’s firing? *Bruen* answers the
21 question elsewhere in its opinion. Commonality is the focus. Consider the following
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23 ⁸⁵ 554 U.S. at 573 (emphasis added).

24 ⁸⁶ 554 U.S. at 625; *see also* at 720 (Breyer, J., dissenting) (describing the majority test in
25 the same terms).

26 ⁸⁷ 561 U.S. at 787.

27 ⁸⁸ *Id.* at 767 (citations omitted).

28 ⁸⁹ 142 S. Ct. at 2156 (citing *Heller*, 554 U.S. at 581).

⁹⁰ *Id.* at 2128 (citing *Heller*, 554 U.S. at 627).

⁹¹ *Id.* at 2134.

1 sentence from *Bruen*: “Drawing from this historical tradition, we explained there that the
2 Second Amendment protects only the carrying of weapons that are those ‘in common use
3 at the time,’ *as opposed to those that ‘are highly unusual in society at large.’*”⁹² Or
4 consider this sentence from *Bruen*’s footnote 13: “Even assuming that pocket pistols
5 were, as East Jersey in 1686 deemed them, ‘unusual or unlawful,’ it appears that they
6 were commonly used at least by the founding.”⁹³ *Bruen* contrasts common pistols against
7 unusual pistols. The focus remains on commonality, not the frequency of actual
8 discharge in self-defense scenarios. Put simply, Second Amendment protection envelops
9 weapons commonly or typically subjectively chosen by citizens to keep in case of
10 confrontation.

11 From *Bruen*, it is evident that the Supreme Court’s focus is on whether a weapon is
12 common (or unusual) amongst the citizenry. This, in turn, requires some sort of
13 generalized numerical estimation of citizen ownership or gauge of present popularity. In
14 *Caetano*, the concurring Justices explained that, “[t]he more relevant statistic is that
15 ‘hundreds of thousands of Tasers and stun guns have been sold to private citizens,’ who it
16 appears may lawfully possess them in 45 States.”⁹⁴ That Ms. Caetano did not actually
17 energize and fire her stun gun made no difference to the Supreme Court. In her case, she
18 did no more than display the weapon. “She stood her ground [and] displayed the stun
19 gun.”⁹⁵ Absent from the opinion is any discussion about the average number of times a
20 stun gun is energized in an average self-defense scenario. Absent from the opinion is any
21 objective metric counting the frequency with which stun guns have been fired. The
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24 ⁹² *Id.* at 2143 (emphasis added).

25 ⁹³ *Id.* at n.13 (citation omitted).

26 ⁹⁴ 577 U.S. at 420 (citations omitted) (“While less popular than handguns, stun guns are
27 widely owned and accepted as a legitimate means of self-defense across the country.
28 Massachusetts’ categorical ban of such weapons therefore violates the Second
Amendment.”).

⁹⁵ *Id.* at 413, (Alito, J., concurring).

1 measure of constitutional protection was that the stun gun was “used” in the sense that
2 stun guns are widely *owned* to satisfy a subjective need for protection and that the
3 number in existence was in the hundreds of thousands.

4 Applying the same measure to magazines, because it is the case that magazines
5 holding more than 10 rounds are owned and possessed by millions of Americans to meet
6 a subjective need for self-defense, this fact alone entitles such magazines to Second
7 Amendment protection. When a magazine is commonly owned by Americans with the
8 subjective intention of using it for self-defense, it is enough to say that it is in common
9 use (or typically used) for self-defense, as the Supreme Court employs the phrase in its
10 opinions.⁹⁶

11 Probably the vast majority of Americans that own magazines of 11 rounds or more
12 keep them and use them for self-defense in the same way that a driver puts on and uses a
13 seat belt in the case of a collision. Though collisions rarely happen, the seat belt is used
14 for protection and to be ready for the unexpected collision. A reserve canopy is being
15 used on a parachute jump, although it is not deployed, in case the main parachute fails. A
16 cell phone in one’s pocket is being used when waiting for a telephone call or in the event
17 one needs to make a call. In the same way, a firearm kept on one’s nightstand is used for
18 self-defense even when the night is quiet. It is kept and used in case of confrontation. A
19 person may happily live a lifetime without needing to fire their gun in self-defense. But
20 that is not to say that such a person does not *use* their gun for self-defense when he or she
21 keeps it under the bed with a hope and a prayer that it never has to be fired.

22 In 2016, an 81-year old Uniontown, Pennsylvania man and his elderly sister were
23 at home when at night an intruder broke in. In the ensuing struggle, the older man fired
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26 ⁹⁶ At the margin, there may be a weapon that is commonly owned that is not commonly
27 used for self-defense. One could imagine perhaps a reproduction of an 18th century
28 flintlock or a World War II German Luger being commonly owned, but used only as
curios or museum pieces.

one shot from his gun at his attacker. The victim said he had never before fired his gun and that it had been sitting on his nightstand for thirty years.⁹⁷ California would say that the victim did not *use* his gun for self-defense on any day of those preceding thirty years. And if his gun had a magazine with eleven or more rounds in it (the news report does not say), California would argue that the victim never did *use* his large capacity magazine in self-defense. This Court would say that the victim *used* his gun every night of the thirty years he subjectively kept it on his bedroom nightstand in case of confrontation, including the night of the burglary. And if his gun had been equipped with a large capacity magazine, it could correctly be said that he also *used* the large capacity magazine for self-defense every night of the thirty years he subjectively kept it on his bedroom nightstand in case of confrontation.

C. The Invention of the 2.2 Shot Average

Without agreeing that when the Supreme Court discusses firearms “in common use” it means commonly fired, even if it did, the State’s statistic is suspect. California relies entirely on the opinion of its statistician for the hypothesis that defenders fire an average of only 2.2 shots in cases of confrontation.

Where does the 2.2 shot average originate? There is no national or state government data report on shots fired in self-defense events. There is no public government database. One would expect to see investigatory police reports as the most likely source to accurately capture data on shots fired or number of shell casings found, although not every use of a gun in self-defense is reported to the police. As between the two sides, while in the better position to collect and produce such reports, the State’s

⁹⁷ *81-year-old fatally shoots home invasion suspect, says gun had never been used in 30 years*, WXPI-TV 11 News (Nov. 4, 2016), <https://www.wpxi.com/news/81-year-old-fatally-shoots-home-invasion-suspect-says-gun-had-never-been-used-in-30-years/464100332/> [<https://perma.cc/FRP6-MA9P>].

1 Attorney General has not provided a single police report to the Court or to his own
2 expert.⁹⁸

3 Without investigatory reports, the State's expert turns to anecdotal statements,
4 often from bystanders, reported in news media, and selectively studied. She indicates she
5 conducted two studies.⁹⁹ Based on these two studies of newspaper stories, she opines that
6 it is statistically rare for a person to fire more than 10 rounds in self-defense and that only
7 2.2 shots are fired on average.¹⁰⁰ Unfortunately, her opinion lacks classic indicia of
8 reliability and her two studies cannot be reproduced and are not peer-reviewed.
9 "Reliability and validity are two aspects of accuracy in measurement. In statistics,
10 reliability refers to reproducibility of results."¹⁰¹ Her studies cannot be tested because she
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14 ⁹⁸ Allen asked the State for police reports, but she did not receive them. *See* Transcript,
15 Preliminary Injunction Hearing, 10/19/20, 153:1-16:

16 "THE COURT: Let me ask you a question. Did you ever ask, for example,
17 [Deputy Attorney General] Mr. Echeverria if he would get you the law enforcement
18 reports of home defense shootings that may have occurred where the homeowner or the
19 person at home fired shots at someone that was intruding?

20 THE WITNESS: Yes. So I did ask both from the State of California as well as
21 from a number of other states that I have worked for, I have asked for data on incidents of
22 exactly that, or whether there was a broader set of data that they had that I could then
23 review.

24 THE COURT: And did you get that from the State of California?

25 THE WITNESS: I did not. It was my understanding that the State of California
26 did not have that data or did not have that in a way that it could be reviewed. That that is
27 not -- that is not a type of data that is collected."

28 ⁹⁹ Lucy Allen Supp. Decl. Dkt 118-1.

¹⁰⁰ Allen Supp. Decl. Dkt 118-1, at ¶10. Of course, though one may assume that "LCMs"
are only used .3% of the time, for the unfortunate homeowner who makes up part of the
.3%, it is 100% of his time.

¹⁰¹ Federal Judicial Center, *Reference Manual on Scientific Evidence* (3d ed.), 211
Reference Guide on Statistics, 2011 WL 7724256, 10 and n.37 ("Daubert v. Merrell
Dow Pharms., Inc., 509 U.S. 579, 590 n.9 (1993), for example, distinguishes "evidentiary
reliability" from reliability in the technical sense of giving consistent results. We use
"reliability" to denote the latter.).

1 has not disclosed her data. Her studies have not been replicated. In fact, the formula
2 used to select 200 news stories for the Factiva study is incomprehensible.

3 For one study, Allen says she conducted a search of stories published in the NRA
4 Institute for Legislative Action magazine (known as the Armed Citizen Database)
5 between 2011 and 2017. There is no explanation for the choice to use 2011 for the
6 beginning. After all, the collection of news stories goes back to 1958. Elsewhere in her
7 declaration she studies mass shooting events but for that chooses a much longer time
8 period reaching back to 1982. Likewise, there is no explanation for not updating the
9 study after 2017.

10 However it is that they were chosen, some 736 incidents in the Armed Citizen
11 Database were said to be analyzed and the number of shots tabulated, but details are
12 completely absent. Allen does not list the 736 stories. Nor does she reveal how she
13 assigned the number of shots fired in self-defense when the news accounts use phrases
14 like “the intruder was shot” but no number of shots was reported, or “there was an
15 exchange of gunfire,” or “multiple rounds were fired.” She includes in her 2.2 average of
16 defensive shots fired, incidents where no shots were fired.¹⁰² One would expect the
17 impact of Allen’s choice to include a zero for a no-shot event to be significant because
18 (even using her number) 32.1% of the events in the home in California were no-shot
19 events.¹⁰³ She also reported no incidents in California where more than 10 shots were
20 fired in self-defense among the stories she reviewed. It seems obvious that in a state
21 where magazines holding more than 10 rounds have been illegal to buy or sell for twenty
22 years, law-abiding citizens are using the smaller magazines that the law requires for self-
23 defense. Absent from the expert opinion is a statistic reporting the average number of
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27 ¹⁰² Allen Supp. Decl. Dkt 118-1 n.10 (“[T]he average includes instances when no shots
28 are fired.”).

¹⁰³ Allen Supp. Decl. Dkt 118-1 at ¶ 12 (table).

1 shots fired by criminals. Also absent is the number of intruders or whether the
2 homeowner was able to escape unharmed.

3 In another example, it is not evident from the study how she counted the number of
4 shots fired for one story in the collection where a homeowner “fired back” and three
5 intruders suffered eight gunshot wounds. Considering most victims miss some of their
6 shots, one would expect in defending against three attackers that more than eight shots
7 were fired in self-defense. Instead, all that the Court is told is:

8 When the exact number of shots fired was not specified, we
9 used the average for the most relevant incidents with [a] known
10 number of shots. For example, if the story stated that “shots
11 were fired” this would indicate that at least two shots were fired
12 and thus we used the average number of shots fired in all
incidents in which two or more shots were fired and the number
of shots was specified.¹⁰⁴

13 She does not reveal the imputed number substitute value that she used where the exact
14 number of shots fired was not specified, so her result cannot be reproduced.

15 Interestingly, substituting an imputed average value for all of the times the number of
16 shots fired is unknown, tends to bring the overall average of shots fired down towards
17 2.2. For example if there are ten incidents of self-defense where nine times the victim
18 fired two shots and one time the victim fired thirteen shots, the average number of shots
19 fired would be 3.1 but the percentage of times more than ten shots were needed for self-
20 defense would be 10%.

21 For a second study, Allen says she conducted a word search of a news aggregator
22 called Factiva. Factiva is a commercial database behind a paywall to which the Court
23 and the public have no access. Even if one did have access to the Factiva database, one
24 could not repeat her study. Allen’s methodology for the Factiva study is
25 incomprehensible. For the Factiva database of 70 million news stories, her word search
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28 ¹⁰⁴ Allen Supp. Decl. Dkt 118-1 n.8.

1 returned 35,000 stories.¹⁰⁵ From there she somehow selected 200 stories of defensive gun
2 use in the home and set out to analyze the events.¹⁰⁶ As with the Armed Citizen study,
3 Allen does not provide a list of the 200 stories she analyzed. Compare that to the long,
4 detailed list of 179 mass shooting stories she includes in the second part of her
5 declaration. For the Factiva study, there is no way to check her analysis or her math.
6 And once again she includes in the averages those events where no shots were fired,
7 bringing the overall average down.¹⁰⁷

8 Had a table of the stories she and her team analyzed been supplied, it would
9 certainly reveal important information. For example, this Court randomly selected two
10 pages from Allen's mass shooting table: pages 10 and 14. From looking at these two
11 pages (assuming that the sources for the reports were accurate and unbiased) the Court is
12 able to make statistical observations, including the observation that the number of shots
13 fired were unknown 69.04% of the time. Without a similar table for the NRA or Factiva
14 studies, this Court cannot ascertain the number of shots fired in each incident, the number
15 of times a homeowner possessed a LCM, the number of times the number of shots fired
16 were unknown, whether the homeowner was unharmed, or the number of intruders.

17 Allen's 2.2 shot average is suspect for larger reasons. The whole statistical
18 exercise is based on hearsay (anecdotes) upon hearsay news reporting, rather than police
19 investigatory reports. A database of news articles lacks the usual indicia of accuracy and
20 reliability of admissible evidence. According to fifteen national polls conducted by non-
21 law enforcement agencies, there may be from 760,000 defensive handgun uses to
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24 ¹⁰⁵ Exh. A at ¶18.

25 ¹⁰⁶ *Id.* at ¶ 19.

26 ¹⁰⁷ Allen Depo. Jan. 12, 2021 at 119:10-18 ("Q. So numerically speaking, inclusion of
27 incidents where the number is zero would tend to drag the average number of shots fired
28 down; would you tend to agree with that? A. So it includes those with zero. That's
correct. Q. Okay. And have you ever looked at the average number of shots fired when
shots were fired? A. No.").

1 3,600,000 defensive uses each year.¹⁰⁸ Compared to the comprehensive details given for
2 her study on mass shooting events, the NRA and Factiva studies are curiously lacking in
3 depth and breadth and causes the Court to deeply discount her opinion.

4 The Court is aware of its obligation to act as a gatekeeper to keep out junk science
5 where it does not meet the reliability standard of *Daubert v. Merrell Dow*
6 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702.¹⁰⁹ In a
7 bench trial, the relevancy bar is low and Rule 702 is to be applied with a liberal thrust
8 favoring admission.¹¹⁰ While opinions and evidence may have been deemed admissible,
9 in some cases, the evidence has been given very little weight or no weight at all. This is
10 the fact finder's role.¹¹¹ "Challenges that go to the weight of the evidence are within the
11 province of a fact finder"¹¹² So, while questionable expert testimony was admitted, it
12 has now been weighed in light of all of the evidence.

13 In assessing expert witness opinion, a court looks to see whether the opinion given
14 is newly made or whether it grew naturally out of research conducted outside of the
15 litigation.¹¹³ Bias may be evident, according to legal authorities, where the expert forms
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18 ¹⁰⁸ Plaintiffs' Exh. 10-10, John R. Lott, Jr., *More Guns, Less Crime* 3d. (2010), at 12.

19 ¹⁰⁹ *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir.2014),
20 *overruled on other grounds, United States v. Bacon*, 976 F.3d 766 (9th Cir. 2020) (en
21 banc) (duty falls squarely upon the district court to act as gatekeeper to exclude junk
science).

22 ¹¹⁰ *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014).

23 ¹¹¹ *Primiano v. Cook*, 598 F.3d 558, 568 (9th Cir. 2010) (though opinion of doctor is
24 admitted, jury may reject the opinion); *see also, e.g., United States v. Vallejo*, 237 F.3d
1008, 1021 (9th Cir. 2001) (admissibility of expert opinion different than weight to be
accorded).

25 ¹¹² *City of Pomona v. SQM North Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014).

26 ¹¹³ *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (after
27 remand) ("One very significant fact to be considered is whether the experts are proposing
28 to testify about matters growing naturally and directly out of research they have
conducted independent of the litigation, or whether they have developed their opinions
expressly for purposes of testifying."); *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1422

1 an opinion without peer-reviewed scientific support or before examining sufficient
2 data.¹¹⁴ Bias may also be evident where an expert opinion is formed solely for the
3 purposes of litigation. Here, the Court is mindful that, “[f]or scientific evidence to be
4 admissible, the proponent must show the assertion is ‘derived by a scientific method,’”
5 and “[o]pinion based on ‘unsubstantiated and undocumented information is the antithesis
6 of scientifically reliable expert opinion.’ “The court must assess the expert's reasoning or
7 methodology, using as appropriate criteria such as testability, publication in peer-
8 reviewed literature, known or potential error rate, and general acceptance.”¹¹⁵ Methods
9 and procedures must be followed and undisciplined speculation is not science.¹¹⁶

10 “To aid courts in exercising this gatekeeping role, the Supreme Court has
11 suggested a non-exclusive and flexible list of factors that a court may consider when
12 determining the reliability of expert testimony, including: (1) whether a theory or
13 technique can be tested; (2) whether it has been subjected to peer review and publication;
14 (3) the known or potential error rate of the theory or technique; and (4) whether the
15 theory or technique enjoys general acceptance within the relevant scientific
16 community.”¹¹⁷ Allen’s study relies on unverified, uncorroborated second or third hand
17 anecdotal information. Normally, “a witness may testify to a matter only if evidence is
18 introduced sufficient to support a finding that the witness has personal knowledge of the
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23 (9th Cir.1998) (expert's development of opinion expressly for purposes of testifying is a
24 significant consideration in evaluating opinion).

25 ¹¹⁴ B. Black & P. Lee, *Expert Evidence* (West 1997), Ch. 4(IV)(B), at 147.

26 ¹¹⁵ *Id.*

27 ¹¹⁶ *Daubert*, 509 U.S. at 589–90. (“The subject of an expert’s testimony must be
28 ‘scientific . . . knowledge.’ The adjective ‘scientific’ implies a grounding in the methods
and procedures of science. Similarly, the word ‘knowledge’ connotes more than
subjective belief or unsupported speculation.”).

¹¹⁷ *Messick*, 747 F.3d at 1197 (quoting *Daubert*, 509 U.S. at 592–94).

1 matter.”¹¹⁸ Assuming its relevance in the first instance for *Bruen* purposes, the statistical
2 analysis has minimal indicia of accuracy or reliability.

3 In the end, Allen opines that an average of 2.2 shots are fired in self-defense gun
4 scenarios and only .3% of such incidents involve more than 10 shots fired. Yet, even .3%
5 is a lot in terms of actual times a citizen needs to fire his gun in self-defense. Using the
6 estimate from the Centers for Disease Control mentioned earlier of 500,000 to 3,000,000
7 times per year nationally, and extrapolating the .3% where more than 10 shots were fired
8 (per Allen’s report), would mean defensive gun uses of more than 10 shots happen
9 between 1,500 and 9,000 times, every year (based on the CDC annual number of
10 defensive gun uses cited on the website Allen cited and relied on¹¹⁹).

11 **D. Magazines Holding More Than 10 Rounds Are Not Dangerous and Unusual**

12 Taking another tack, the State reframes the “dangerous and unusual” test as a
13 “dangerous *or* unusual” test and then objects that magazines able to hold more than 10
14 rounds are unusually dangerous. As the Court has stated, all guns and ammunition are
15 dangerous.¹²⁰ However, magazines holding more than 10 rounds are not both “dangerous
16 and unusual,” which is the Supreme Court’s test. So-called large capacity magazines
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23 ¹¹⁸ Federal Rule of Evidence 602.

24 ¹¹⁹ In her Supplemental Declaration, at footnote 4, Dkt. 118-1, Allen cites a Heritage
25 Foundation online visual database:
26 <https://datavisualizations.heritage.org/firearms/defensive-gun-uses-inthe-us>. If one looks
27 at the Heritage Foundation description of its visual database research, one would see that
28 it acknowledges the CDC report that Americans use their firearms defensively between
500,000 and 3,000,000 million times each year.

¹²⁰ *Staples*, 511 U.S. at 611 (“Despite their potential for harm, guns generally can be
owned in perfect innocence.”).

1 banned in California are commonly-owned by law-abiding citizens across the nation¹²¹
2 and number in the millions.¹²²

3 **E. The Most-Useful-for-Military-Service Nostrum**

4 The State argues, and some courts have reasoned, that magazines holding more
5 than 10 rounds are “most useful in military service” and therefore, can be banned.¹²³ The
6 Supreme Court said no such thing.¹²⁴ *Caetano* addresses this question and says, “*Heller*
7 rejected the proposition ‘that only those weapons useful in warfare are protected.’”¹²⁵
8 *Heller* was explaining *United States v. Miller*.¹²⁶ In *Miller*, the Supreme Court applied a
9 reasonable-relationship-to-militia-use test to a short-barreled shotgun, asking whether the
10 shotgun would have a reasonable relationship to the preservation or efficiency of a well-
11 regulated militia. Finding none, it decided the Second Amendment did not guarantee the
12 right to keep that particular firearm.¹²⁷ *Miller*’s realm of Second Amendment protection
13 encircled a firearm if it was reasonably related to militia use. This “reasonably-related”
14 construct received a nod again in *Lewis v. U.S.*,¹²⁸ where the Supreme Court sang *Miller*’s

17 ¹²¹ “It is indisputable in the modern United States that magazines of up to thirty rounds
18 for rifles and up to twenty rounds for handguns are standard equipment for many popular
19 firearms.” Kopel, *supra*, *The History of Firearm Magazines*, at 874, Declaration of Anna
M. Barvir in Support of Plfs.’ Suppl. Br., Exh. 39, Dkt. 132-6, at 125.

20 ¹²² See nn. 28-31, *supra*, and accompanying text.

21 ¹²³ See, e.g., *Hanson v. D.C.*, No. CV 22-2256-RC, 2023 WL 3019777, at *28–29
(D.D.C. Apr. 20, 2023) (“LCMs are not covered by the Second Amendment because they
are most useful in military service.”).

22 ¹²⁴ See, e.g., *Bevis v. City of Naperville*, No. 22 C 4775, 2023 U.S. Dist. LEXIS 27308, at
23 *22 (N.D. Ill. Feb. 17, 2023) (“Relatedly, the Supreme Court has unequivocally
24 dismissed the argument that ‘only those weapons useful in warfare are protected.’ To the
25 extent that the Seventh Circuit classified the weapon as either ‘civilian’ or ‘military,’ the
classification has little relevance.”) (citation omitted).

26 ¹²⁵ *Caetano*, 577 U.S. at 412 (quoting *Heller*, 554 U.S. at 624–25).

27 ¹²⁶ 307 U.S. 174 (1939)

28 ¹²⁷ *Id.* (“Certainly it is not within judicial notice that this weapon is any part of the
ordinary military equipment or that its use could contribute to the common defense.”).

¹²⁸ 445 U.S. 55, 65 n.8 (1980).

1 refrain, “the Second Amendment guarantees no right to keep and bear a firearm that does
2 not have ‘some reasonable relationship to the preservation or efficiency of a well
3 regulated militia.’” There was no undercutting of *Miller* in the *Heller* or *Bruen* decisions.
4 Rather, *Heller* embraced *Miller* and said “[w]e therefore read *Miller* to say only that the
5 Second Amendment does not protect those weapons not typically possessed by law-
6 abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with
7 the historical understanding of the scope of the right.”¹²⁹ And *Bruen* “quoted, explained,
8 re-affirmed, and then applied” *Miller*.¹³⁰ *Heller* took the already expansive zone of
9 protection for weapons that could be used by the militia and focused on the core use of
10 firearms for self-defense.

11 In other words, *Heller* made the logical connection between weapons commonly
12 possessed by law-abiding citizens for lawful purposes that would also be useful, if
13 necessary, for military purposes, *i.e.*, in the militia. Since *Miller*, the Supreme Court has
14 enlarged the breadth of firearms protected by the Second Amendment to include
15 commonly owned firearms useful for the core right of self-defense and other lawful
16 purposes like hunting, sporting, and target shooting. Until the Supreme Court clearly
17 says otherwise, commonly owned weapons that are useful for war and are reasonably
18 related to militia use are also fully protected, so long as they are not useful solely for
19 military purposes. Firearms with magazines holding more than 10 rounds are such
20 reasonably-related arms. Even *Miller* understood the Constitution to protect the
21 possession of ammunition. For the militia system to function, “[t]he possession of arms
22 also implied the possession of ammunition, and the authorities paid quite as much
23 attention to the latter as to the former.”¹³¹ All considered, the best reading of “arms”
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25 ¹²⁹ *Heller*, 554 U.S. at 625.

26 ¹³⁰ *United States v. Saleem*, No. 3:21-cr-00086-FDW-DSC, 2023 WL 2334417, at *7
27 (W.D.N.C. Mar. 2, 2023).

28 ¹³¹ *Miller*, 307 U.S. at 180 (quoting *The American Colonies In The 17th Century*, Osgood,
Vol. 1, ch. XIII).

1 includes magazines.¹³²

2 **III. BRUEN AND THE MAGAZINE CAPACITY LIMIT**

3 Plaintiffs challenge § 32310, which prohibits manufacturing, importing, keeping
4 for sale, offering for sale, giving, lending, buying, receiving or possessing a magazine
5 able to hold more than 10 rounds. For simple possession of a magazine holding more
6 than 10 rounds, the crime is an infraction under § 32310(c). It is a much more serious
7 crime to acquire a magazine holding more than 10 rounds in California by importing,
8 buying, borrowing, receiving, or manufacturing. These acts may be punished as a
9 misdemeanor or a felony under § 32310(a). Under the subsection’s provision, “or
10 imprisonment pursuant to subdivision (h) of Section 1170,” punishment may be either a
11 misdemeanor or a felony.

12 This Court concludes, once again, that manufacturing, importing, selling, giving,
13 loaning buying, receiving, acquiring,¹³³ possessing, storing, or using commonly-owned
14 magazines capable of holding more than 10 rounds for self-defense at home or in public
15 is protected by the Second Amendment. Whether 50-round, 75-round, or 100-round
16 drum magazines are constitutionally protected is a different question because they may be
17 much less common and may be unusual.

18 **A. Remand for Bruen Review**

19 This case was remanded from the United States Court of Appeals for the Ninth
20 Circuit in order to consider the challenged laws under the recent Supreme Court decision
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23 ¹³² *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) (“Because
24 restrictions on ammunition may burden the core Second Amendment right of self-defense
25 and the record contains no persuasive historical evidence suggesting otherwise, section
26 613.10(g) regulates conduct within the scope of the Second Amendment.”).

27 ¹³³ “This acquisition right is protected as an ‘ancillary right’ necessary to the realization
28 of the core right to possess a firearm for self-defense.” *Renna v. Becerra*, No. 20-cv-
02190-DMS (DEB), 2021 WL 1597933, at *6 (S.D. Cal. Apr. 23, 2021) (quoting
Teixeira v. County of Alameda, 873 F.3d 670, 677 (9th Cir. 2017)) (*en banc*) (core
Second Amendment right “wouldn’t mean much” without ability to acquire arms).

1 in *Bruen*. Under *Bruen*, the government must affirmatively prove that its firearm
2 regulation is part of a constitutional historical tradition. It is the same text, history, and
3 tradition standard the Court used in *Heller* and *McDonald*. What is different is that the
4 old means-end, interest balancing, tiers-of-scrutiny test is no longer viable.¹³⁴ The State
5 now has a second chance to defend its large capacity magazine ban and must do so
6 applying the *Bruen* test.

7 *Bruen* says,

8 When the Second Amendment’s plain text covers an
9 individual’s conduct, the Constitution presumptively protects
10 that conduct. *The government must then justify its regulation*
11 *by demonstrating that it is consistent with the Nation’s*
12 *historical tradition of firearm regulation.* Only then may a
court conclude that the individual’s conduct falls outside the
Second Amendment’s “unqualified command.”¹³⁵

13 And *Bruen* confirms, once again, that the Second Amendment applies to modern arms.
14 “Thus, even though the Second Amendment’s definition of ‘arms’ is fixed according to
15 its historical understanding, that general definition covers modern instruments that
16 facilitate armed self-defense,” like magazines able to hold more than 10 rounds.¹³⁶

17 **i. Already Determined: No Historical Pedigree**

18 This Court previously determined that a ban on magazines able to hold more than
19 10 rounds has no historical pedigree. Detachable magazines were invented in the late
20 19th Century.¹³⁷ In 1990, New Jersey introduced the first ban on detachable magazines,
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23 ¹³⁴ *Baird v. Bonta*, 2023 WL 5763345, *5 (9th Cir. Sept. 7, 2023) (“In *Bruen*, the
24 Supreme Court expressly rejected the use of such ‘means-end scrutiny in the Second
Amendment context’ and described the two-step approach as ‘one step too many.’”).

25 ¹³⁵ 142 S. Ct. at 2129–30 (emphasis added).

26 ¹³⁶ *Id.* at 2132.

27 ¹³⁷ “In 1879, Remington introduced the first ‘modern’ detachable rifle magazine. In the
28 1890s, semiautomatic pistols with detachable magazines followed. During WWI,
detachable magazines with capacities of 25 to 32-rounds were introduced.” Plaintiff’s
Exh. 2 (Stephen Helsley Report), at 4.

1 initially imposing a 15-round limit and later a 10-round limit. California put its ban in
2 place in the year 2000. A historical tradition of magazine bans, this is not.

3 Before *Bruen*, the State unpersuasively argued that its magazine capacity
4 restriction was analogous to a handful of state machinegun firing-capacity regulations
5 from the 1920's and 1930's and one District of Columbia law from 1932—a law the
6 Supreme Court ignored while dismantling the District of Columbia's handgun ban in
7 *Heller*. That argument remains unpersuasive today. That was pre-*Bruen*. *Bruen* invites
8 a look farther back into the Nation's history.

9 **ii. The State Asked for Time for Discovery**

10 Because the *Bruen* approach places the burden upon the government to justify its
11 firearm restrictions by demonstrating that they are consistent with the Nation's historical
12 tradition of firearm regulation as understood at the founding, and because judicial review
13 under the *Bruen* standard is in its infancy, the State has been given generous time and
14 leeway to satisfy its new burden. The State's experts have been studying historic firearm
15 regulations for more than 20 years.¹³⁸ This Court has reviewed all of the declarations of
16 the State's experts and historians as well as many of their cited sources, and finds no
17 support for the State's ban.

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20 ¹³⁸ The State's expert, professor Robert Spitzer, has studied gun policy for 30 years. *See*
21 Decl. of Robert Spitzer, Dkt. 137-8 ("Spitzer Decl."), at ¶ 5. The State's expert,
22 professor Saul Cornell, said that he has been studying gun regulations for 20 years. That
23 was in 2017. *See* Saul Cornell, Five Types of Gun Laws the Founding Fathers Loved,
24 Salon (Oct. 22, 2017, 7:29 a.m.), [https://www.salon.com/2017/10/22/five-types-of-gun-](https://www.salon.com/2017/10/22/five-types-of-gun-laws-the-founding-fathers-loved_partner/)
25 [laws-the-founding-fathers-loved_partner/](https://www.salon.com/2017/10/22/five-types-of-gun-laws-the-founding-fathers-loved_partner/) [<https://perma.cc/73SL-VAKV>]. Ten years
26 ago, Mark Anthony Frassetto compiled a list of over 1,000 historical gun laws spanning
27 the years 1607 to 1934 and available on the Social Science Research Network.
28 [<https://perma.cc/Q2L8-SW6U>]. His law collection was not unknown. It was described
in detail in 2017 by professor Spitzer in his article *Gun Law History in the United States*
and *Second Amendment Rights*, 80 L. & Contemp. Probs. 55 (2017), and included in
professor Cornell's Compendium of Works cited in his Declaration, Dkt. 154-3, at 1707–
33.

1 **iii. Some Text, History, and Tradition Analysis is Already Done**

2 Some of the time spent analyzing text, history, and tradition, has already been done
3 by the Supreme Court. To begin, “the ‘textual elements’ of the Second Amendment’s
4 operative clause—‘the right of the people to keep and bear Arms, shall not be
5 infringed’—‘guarantee the individual right to possess and carry weapons in case of
6 confrontation.’”¹³⁹ Further, “the right to ‘bear arms’ refers to the right to ‘wear, bear, or
7 carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being
8 armed and ready for offensive or defensive action in a case of conflict with another
9 person.’”¹⁴⁰ The Supreme Court explains that the terms “keep” and “bear” mean that the
10 Second Amendment’s text protects a citizen’s right to “‘keep’ firearms in their home, at
11 the ready for self-defense,” and to carry arms on one’s person in and outside the home in
12 case of confrontation.¹⁴¹ As to the types of weapons the Second Amendment protects,
13 *Bruen* echoes *Heller*, *McDonald*, *Caetano*, *Miller*, and *Blackstone*, pronouncing that it
14 “protects the possession and use of weapons that are ‘in common use at the time.’”¹⁴²

15 In this case, Plaintiffs are law-abiding citizens who want to possess (or keep) and
16 carry (or bear), magazines able to hold more than 10 rounds commonly-owned for lawful
17 purposes. Plaintiffs’ proposed conduct is covered by the plain text of the Second
18 Amendment. Under the plain text, the State’s statute infringes on the constitutional rights
19 of American citizens. Therefore, Plaintiffs have met their burden of showing that the
20 prohibited magazines fall within the Second Amendment’s text.

21 *Bruen* next instructs courts to assess whether the initial conclusion is confirmed by
22 the historical understanding of the Second Amendment. *Bruen* has already confirmed
23 that the Second Amendment protects an individual right to armed self-defense. It repeats
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26 ¹³⁹ *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592).

27 ¹⁴⁰ *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 584).

28 ¹⁴¹ *Id.*

¹⁴² *Id.* at 2128 (citations omitted).

1 *Heller*’s lesson to not engage in means-end scrutiny, because, “[a] constitutional
2 guarantee subject to future judges’ assessments of its usefulness is no constitutional
3 guarantee at all.”¹⁴³ After all, “[t]he Second Amendment ‘is the very product of an
4 interest balancing by the people’ and it ‘surely elevates above all other interests the right
5 of law-abiding, responsible citizens to use arms’ for self-defense. It is this balance—
6 struck by the traditions of the American people—that demands our unqualified
7 deference.”¹⁴⁴

8 **B. Bruen’s Guidelines for Historical Inquiry**

9 For conducting a historical inquiry, *Bruen* identifies a number of guidelines. First,
10 “when a challenged regulation addresses a general societal problem that has persisted
11 since the 18th century, the lack of a distinctly similar historical regulation addressing that
12 problem is relevant evidence that the challenged regulation is inconsistent with the
13 Second Amendment.”¹⁴⁵ Second, “if earlier generations addressed the societal problem,
14 but did so through materially different means, that also could be evidence that a modern
15 regulation is unconstitutional.”¹⁴⁶ Third, “if some jurisdictions actually attempted to
16 enact analogous regulations during this timeframe, but those proposals were rejected on
17 constitutional grounds, that rejection surely would provide some probative evidence of
18 unconstitutionality.”¹⁴⁷ Fourth, “cases implicating unprecedented societal concerns or
19 dramatic technological changes may require a more nuanced approach.”¹⁴⁸ Fifth, “[w]hen
20 confronting such present-day firearm regulations, this historical inquiry that courts must
21 conduct will often involve reasoning by analogy.”¹⁴⁹ “Determining whether a historical
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24 ¹⁴³ *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

25 ¹⁴⁴ *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635).

26 ¹⁴⁵ *Bruen*, 142 S. Ct. at 2131.

27 ¹⁴⁶ *Id.*

28 ¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2132.

¹⁴⁹ *Id.*

1 regulation is a proper analogue for a distinctly modern firearm regulation requires a
2 determination of whether the two regulations are ‘relevantly similar.’”¹⁵⁰ *Bruen* notes,
3 analogical reasoning under the Second Amendment is neither a
4 regulatory straightjacket nor a regulatory blank check. On the
5 one hand, courts should not “uphold every modern law that
6 remotely resembles a historical analogue,” because doing so
7 “risks endorsing outliers that our ancestors would never have
8 accepted.” On the other hand, analogical reasoning requires
9 only that the government identify a well-established and
10 representative historical analogue, not a historical twin. So
even if a modern-day regulation is not a dead ringer for
historical precursors, it still may be analogous enough to pass
constitutional muster.¹⁵¹

11 In surveying American history, the task is to stay within *Bruen*’s guardrails. As to the
12 road ahead, it is a road back to 1791.

13 **i. The Significant Time Period—1791 to 1868**

14 *Bruen* teaches the most significant historical evidence comes from 1791, and
15 secondarily 1868. For the Second Amendment (and other protections in the Bill of
16 Rights), “Constitutional rights are enshrined with the scope they were understood to have
17 *when the people adopted them.*”¹⁵² The Second Amendment was adopted in 1791.
18 “[W]e have generally assumed that the scope of the [Second Amendment] protection
19 applicable to the Federal Government and States is pegged to the public understanding of
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23 ¹⁵⁰ *Id.*

24 ¹⁵¹ *Id.* at 2133.

25 ¹⁵² *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634–35); *cf. Kennedy v. Bremerton*, 142 S. Ct.
26 2407, 2428 (2022) (“[T]his Court has instructed that the Establishment Clause must be
27 interpreted by reference to historical practices and understandings. The line . . . has to
28 accord with history and faithfully reflect the understanding of the Founding Fathers.”)
(cleaned up); *Riley v. California*, 573 U.S. 373, 403 (2014) (“Our cases have recognized
that the Fourth Amendment was the founding generation’s response to the reviled
‘general warrants’ and ‘writs of assistance’ of the colonial era.”).

1 the right when the Bill of Rights was adopted in 1791.”¹⁵³ Consequently, whatever
2 evolving standards of gun regulation the state legislature thought was good policy in the
3 year 2000 (when it decided 11 rounds is not well-suited for a person to have in a gun) or
4 the year 2016 (when it was amended by Proposition 63), or today, is not the test for
5 constitutional scrutiny.

6 Courts are to “afford greater weight to historical analogues more contemporaneous
7 to the Second Amendment’s ratification.”¹⁵⁴ British sources pre-dating the Constitution
8 are not particularly instructive because the American Revolution was a rejection of
9 British rule. Sources post-enactment are also less helpful.¹⁵⁵ “[T]o the extent later
10 history contradicts what the text says, the text controls Thus, post-ratification
11 adoption or acceptance of laws that are inconsistent with the original meaning of the
12 constitutional text obviously cannot overcome or alter that text.”¹⁵⁶ Late 19th century
13 evidence is not particularly instructive, “because post-Civil War discussions of the right
14 to keep and bear arms ‘took place 75 years after the ratification of the Second
15 Amendment, they do not provide as much insight into its original meaning as earlier
16 sources.’”¹⁵⁷ Even so, evidence from the time period enforces the claim that the right to
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19 ¹⁵³ *Bruen*, 142 S. Ct. at 2137.

20 ¹⁵⁴ *Rahimi*, 61 F.4th at 456; *contra Nat’l Rifle Ass’n v. Bondi*, 61 F.4th 1317, 1323 (11th
21 Cir. 2023) (“For most cases, the Fourteenth Amendment Ratification Era understanding
22 of the right to keep and bear arms will differ from the 1789 understanding. And in those
23 cases, the more appropriate barometer is the public understanding of the right when the
States ratified the Fourteenth Amendment and made the Second Amendment applicable
to the States.”).

24 ¹⁵⁵ *Bruen*, 142 S. Ct. at 2136 (“Similarly, we must also guard against giving
postenactment history more weight than it can rightly bear.”).

25 ¹⁵⁶ *Id.* at 2137 (citations omitted) (cleaned up).

26 ¹⁵⁷ *Id.* (quoting *Heller*, 554 U.S. at 614). There is little reason to rely on laws from the
27 later part of the 1800’s or the 1900’s rather than ones put into effect at the time of the
founding in view of *Bruen*’s central question about the meaning of the Second
28 Amendment as understood by the people who adopted it. *See Worth v. Harrington*, No.
21-cv-01348-KMM-LIB, 2023 WL 2745673, at *12 (D. Minn. Mar. 31, 2023) (“But the

1 keep and bear arms continued to be regarded as a fundamental right. The Supreme Court
2 gauged the most explicit evidence appeared in the Freedmen’s Bureau Act of 1866. “The
3 most explicit evidence of Congress’ aim,” according to *McDonald*, “appears in § 14 of
4 the Freedmen’s Bureau Act of 1866, which provided that ‘the right . . . to have full and
5 equal benefit of all laws and proceedings concerning personal liberty, personal security
6 [and] . . . including the constitutional right to bear arms, shall be secured to and enjoyed
7 by all the citizens.’”¹⁵⁸ *McDonald* points to one senator’s description of the right to bear
8 arms for one’s defense as an “indispensable safeguard of liberty.” *McDonald* writes,

9 “Every man . . . should have the right to bear arms
10 for the defense of himself and family and his
11 homestead. And if the cabin door of the freedman
12 is broken open and the intruder enters for purposes
13 as vile as were known to slavery, then should a
14 well-loaded musket be in the hand of the occupant
15 to send the polluted wretch to another world,
16 where his wretchedness will forever remain
17 complete.”¹⁵⁹

18 Thus, it can be said that, even at the time of the Fourteenth Amendment, the right to keep
19 and bear guns was a necessary right to preserve. “In sum, it is clear that the Framers and
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21 Commissioner offers no persuasive reason why this Court should rely upon laws from the
22 second half of the nineteenth century to the exclusion of those in effect at the time of the
23 founding in light of *Bruen*’s warnings not to give post-Civil War history more weight
24 than it can rightly bear.”); *Firearms Pol’y Coalition, Inc. v. McCraw*, No. 4:21-cv-01245-
25 P, 2022 WL 3656996, at *11 (N.D. Tex. Aug. 25, 2022); *United States v. Harrison*, No.
26 CR 22-00328-PRW, 2023 WL 1771138, at *8 (W.D. Okla. Feb. 3, 2023) (quoting *Bruen*,
27 142 S. Ct. at 2136 (Barrett, J., concurring) (“[T]oday’s decision should not be understood
28 to endorse freewheeling reliance on historical practice from the mid-to-late 19th century
to establish the original meaning of the Bill of Rights.”)); *contra Hanson*, No. CV 22-
2256-RC, 2023 WL 3019777, at *16 (“In this case, it is appropriate to apply 20th century
history to the regulation at issue.”).

¹⁵⁸ *McDonald*, 561 U.S. at 773.

¹⁵⁹ *McDonald*, 561 U.S. at 775-76 (citation omitted).

1 ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among
2 those fundamental rights necessary to our system of ordered liberty.”¹⁶⁰

3 *Bruen* and *Heller* have already considered some of the historical firearm statutes.
4 Consequently, we know that colonial laws restricting handguns that were dangerous and
5 unusual in the 1690’s do not justify modern laws restricting handguns. The Court
6 explains that even if handguns were considered “dangerous and unusual” in the 1690’s, it
7 would not matter because handguns are common today. As *Bruen* puts it,

8 Whatever the likelihood that handguns were considered
9 “dangerous and unusual” during the colonial period, they are
10 indisputably in “common use” for self-defense today. They are,
11 in fact, “the quintessential self-defense weapon.” Thus, even if
12 these colonial laws prohibited the carrying of handguns because
13 they were considered “dangerous and unusual weapons” in the
14 1690s, they provide no justification for laws restricting the
15 public carry of weapons that are unquestionably in common
16 use.

15 **C. The State’s List of Relevant Laws**

16 To aid in the task of looking for a national “historical tradition of firearm
17 regulation,” the State was directed to create a list of relevant laws regulating arms dating
18 from the time of the Second Amendment (1791) to 20 years after the Fourteenth
19 Amendment (1868 + 20). This was not an acknowledgement that 20 years after the
20 Fourteenth Amendment is a relevant period. Twenty years after the Fourteenth
21 Amendment is an admittedly arbitrary limit and probably includes laws too late to shed
22 much light.

23 In any event, the State went far beyond. The State produced a list of 316 laws
24 covering 550 years—from 1383 to 1933.¹⁶¹ Many of the entries are not relevant because
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27 ¹⁶⁰ *McDonald*, 561 U.S. at 778.

28 ¹⁶¹ See Def’s Survey of Relevant Statutes, Dkt. 139-1 to 3 (citations to the individual law
entries herein are indicated by brackets [--]).

1 they came much earlier or later than the most significant time period of 1791–1868. The
2 first fourteen listed laws pre-date the Second Amendment.¹⁶² On the other end, the last
3 225 laws post-date the adoption of the Fourteenth Amendment. Also, two-thirds of the
4 State’s list (199 laws) are restrictions on *use*—not on possession or acquisition. Here, the
5 magazine ban prohibits possession, manufacturing, giving, lending, offering for sale, etc.,
6 rather than regulating the *use* or *manner* of carrying ammunition or its magazines.
7 Twenty-two tax laws are included in the State’s historical list, yet the law challenged here
8 imposes no tax on magazines. The State’s historical list also includes, surprisingly, 38
9 laws that applied only to particular groups, such as slaves, Blacks, or Mulattos. Those
10 laws are not relevant to the magazine prohibition challenged in this case. “And
11 Founding-era statutes that disarmed groups of persons who governments thought might
12 be dangerous because of their race or religion were not considered analogous to modern
13 carry prohibitions on released felons also thought to be dangerous: ‘any such analogy
14 would be far too broad.’”¹⁶³ Even if they were, this Court would give such
15 discriminatory laws little or no weight.

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20 ¹⁶² The State includes in its list a concealed carry statute in East New Jersey from 1686
21 which treated pocket pistols as “unusual” weapons. [6]. *Bruen* bulldozed that citation.
22 The East New Jersey statute was too old and too different. *Bruen* found little there to
23 commend a present-day ban on carrying pistols. The statute prohibited only the
24 concealed carrying of pocket pistols; it did not prohibit possession or public carrying.
25 *Bruen*, 142 S. Ct. at 2143. The statute did not apply to all pistols, much less all firearms.
26 Moreover, even if pocket pistols were uncommon in 1686 in East New Jersey, they were
27 commonly used by the time of the founding. *Id.* at 2144 and n.13. The statute did not
28 survive the merger of East and West New Jersey in 1702. Consequently, the Court made
short work of the history summing it up, “[a]t most eight years of history in half a Colony
roughly a century before the founding sheds little light on how to properly interpret the
Second Amendment.” *Id.* at 2144.

¹⁶³ *Baird*, 2023 WL 5763345 at *8 (citations omitted).

1 **IV. IN AMERICA PEOPLE WERE GENERALLY FREE TO CARRY**
2 **FIREARMS PUBLICLY AND PEACEABLY FROM 1791 to 1868**

3 **A. Traditions**

4 The history and tradition of the United States is a tradition of widespread gun
5 ownership and expertise. *Bruen* says, “those who sought to carry firearms publicly and
6 peaceably in antebellum America were generally free to do so.”¹⁶⁴ Thomas Jefferson
7 pointed out that our soldiers were good shots because they had practiced with guns since
8 they were children. Jefferson wrote,

9 I inclose you a list of the killed, wounded, and captives of the
10 enemy from the Commencement of hostilities at Lexington in
11 April 1775, until November 1777. since which there has been
12 no event of any consequence ... I think that upon the whole it
13 has been about one half the number lost by them. In some
14 instances more, but in others less. *This difference is ascribed to*
our superiority in taking aim when we fire; every soldier in our
*army having been intimate with his gun from his infancy.*¹⁶⁵

15 Then, having firearms was commonplace. Carrying firearms was accepted. Proficiency
16 with firearms was encouraged. Readiness with firearms was required. Then, as now,
17 terrorizing with a firearm or carrying a firearm with the intent to assault another was
18 punishable. But, “[n]one of the [] historical limitations on the right to bear arms . . .
19 operated to prevent law-abiding citizens with ordinary self-defense needs from carrying
20 arms in public for that purpose.”¹⁶⁶

21 Notwithstanding having significant time to do so, the State has identified no
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24 ¹⁶⁴ 142 S. Ct. at 2146.

25 ¹⁶⁵ Letter from Thomas Jefferson, to Giovanni Fabbroni, *Founders Online*, National
26 Archives (June 8, 1778), [https://founders.archives.gov/documents/Jefferson/01-02-02-](https://founders.archives.gov/documents/Jefferson/01-02-02-0066)
27 [0066 \[https://perma.cc/8VTV-K9HB\]](https://perma.cc/8VTV-K9HB); [Original source: *The Papers of Thomas Jefferson*,
28 vol. 2, 1777–18 June 1779, ed. Julian P. Boyd. Princeton: Princeton University Press,
1950, pp. 195–98] (emphasis added).

¹⁶⁶ *Bruen*, 142 S. Ct. at 2150.

1 historical statute or national tradition of firearm regulation so broad in its coverage or so
2 far reaching in its effect as its large capacity magazine ban. So, what are the traditions of
3 firearm regulation evidenced by the State’s law list?

4 Historical regulations are considered chronologically, “mindful that greater weight
5 attaches to laws nearer in time to the Second Amendment’s ratification.”¹⁶⁷ The Court
6 has reviewed every law cited in the State’s list. It has sometimes searched for the actual
7 text of a cited law rather than the parties’ summary in order to understand any legal
8 nuance. It has reviewed the laws with a view to understanding the tradition of all the
9 states and their contexts. For example, as the nation expanded old states became interior
10 states and new states became frontier states. Frontier states often had different social and
11 security concerns than did the interior of the new nation. The Court sought to understand
12 how states responded to new technological developments in ammunition, revolvers,
13 repeaters, and high-capacity, fast-shooting, lever-action rifles.

14 The State’s experts opine that gun laws were plentiful and widespread and firearm
15 regulation was the norm. But, if the test were to look at gun laws with that level of
16 generality, no gun law would ever fail scrutiny and *Heller*, *McDonald* and *Bruen* could
17 not have been decided as they were. Furthermore, as will be shown, it is an exaggeration.
18 The State also says regulations on dangerous or unusual *weapons* existed throughout
19 American history. By “weapons,” the State means non-firearms.

20 Relevantly similar regulations are *firearm* prohibitions—not bladed or melee
21 weapon regulations. And neither “dangerous or unusual” nor “unusually dangerous” is
22 the test, although the State cannot point to an outright prohibition on even unusual or
23 unusually dangerous *firearms* until Alabama’s 1868 prohibition on the dangerous and
24 unusual rifle-walking cane. [87]

25 Because the State cannot find a historic regulation of *firearms*, it turns to the
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28 ¹⁶⁷ *Rahimi*, 61 F.4th at 456.

1 historic regulations of *weapons*, whether bladed weapons, melee weapons, blunt
2 weapons, or leaded weapons. Yet, the Supreme Court does not look to knife laws when
3 reviewing a restriction about guns. *Bruen* teaches that a state’s burden is to identify a
4 historical tradition of *firearm* regulation, not a tradition of knife regulation. Underscoring
5 the importance of its words, three different times *Bruen* repeats the specific phrase
6 “firearm regulation,” as in the following instances: (1) “Rather, the government must
7 demonstrate that the regulation is consistent with this Nation’s historical tradition of
8 *firearm regulation*;¹⁶⁸ (2) “The government must then justify its regulation by
9 demonstrating that it is consistent with the Nation’s historical tradition of *firearm*
10 *regulation*,”¹⁶⁹ and (3) “[T]he burden falls on respondents to show that New York’s
11 proper-cause requirement is consistent with this Nation’s historical tradition of *firearm*
12 *regulation*.”¹⁷⁰ In contrast, the *Bruen* majority opinion did not mention bowie knives at
13 all. The Supreme Court was not interested in traditions of knife regulation or melee
14 regulation. Even in the dissent, bowie knife laws were hardly mentioned. Consequently,
15 when the State asserts, “weapons restrictions proliferated,” it misses the mark by
16 referring to non-firearm weapon restrictions or concealed carrying restrictions.¹⁷¹

17 During the most important period of history, there were relatively few firearm
18 regulations.¹⁷² This conclusion can be drawn from inspecting the State’s historic law list,
19 and is confirmed by at least one historian: “Between 1607 and 1815 . . . the colonial and
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22 ¹⁶⁸ *Bruen*, 142 S. Ct. at 2126 (emphasis added).

23 ¹⁶⁹ *Id.* at 2130 (emphasis added).

24 ¹⁷⁰ *Id.* at 2135 (emphasis added).

25 ¹⁷¹ Def’s Br. in Resp., Dkt. 142, at 20.

26 ¹⁷² It is true that there were laws criminalizing the *use* of guns for criminal acts such as
27 carrying a gun with intent to assault another, or displaying a gun in a threatening manner.
28 These were crimes of violence, not crimes of possession. California, as it should, has
similar laws today, such as California Penal Code § 245(a)(2) & (3) (assault with a
deadly weapon - firearm) and § 417(a)(2) (exhibition of a firearm in a rude, angry, or
threatening manner).

1 state governments of what would become the first fourteen states neglected to exercise
2 any police power over the ownership of guns by members of the body politic These
3 limits on colonial and early state regulation of arms ownership outlined a significant zone
4 of immunity around the private arms of the individual citizen.”¹⁷³ It is a conclusion
5 confirmed by the Supreme Court. “Apart from a few late 19th-century outlier
6 jurisdictions, American governments simply have not broadly prohibited the public carry
7 of commonly used firearms for personal defense.”¹⁷⁴

8 There were regional differences, no doubt.¹⁷⁵ As the nation aged, northern states
9 had virtually no restrictions on guns and none on ammunition while southern states
10 tended to mainly prohibit concealed carrying.¹⁷⁶ In short, the State argues that because
11 some states have regulated in some ways the use of some *weapons* (primarily knives and
12 melee devices), that translates into the State being able to regulate any magazine in any
13 way. That is a *non sequitur* and in this particular case—a bridge too far.

14 **i. No Prohibitions on Possessing Guns**

15 It is remarkable to discover that there were no outright prohibitions on keeping or
16 possessing guns. No laws of any kind.¹⁷⁷ Based on a close review of the State’s law list
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19 ¹⁷³ Robert H. Churchill, *Forum: Rethinking the Second Amendment*, 25 L. & Hist. Rev.
20 139, 161 (2007).

21 ¹⁷⁴ *Bruen*, 142 S. Ct. at 2156.

22 ¹⁷⁵ “[T]here were profound regional differences in early America.” Decl. of Saul Cornell,
23 Dkt. 118-4 (“Cornell Decl.”) at n.49.

24 ¹⁷⁶ Don B. Kates, Jr., *Restricting Handguns* 12 (North River Press ed., 1979), found in
25 Compendium Works Cited in Decl. of Randolph Roth, Dkt. 118-8, at n.53 and 0349 (“By
26 1850, every Western state barred the carrying of concealed weapons. In contrast, none of
27 the Northeastern states adopted even that mild a restriction until nearly the turn of the
28 twentieth century. Until 1924, for instance, the only gun law in New Jersey was the
prohibition of dueling.”).

¹⁷⁷ According to one scholar, the first prohibition on simple ownership of a gun came in
1911. Churchill, *supra*, at 139 n.61 (“The first law restraining gun ownership by citizens
mentioned in the secondary literature is New York’s 1911 Sullivan Law, which
prohibited the ownership of concealable arms without a police permit.”); *see also* David

1 and the Court’s own analysis, Plaintiffs are correct in asserting that there are no
2 Founding-era categorical bans on firearms in this nation’s history. Though it is the
3 State’s burden, even after having been offered plenty of opportunity to do so, the State
4 has not identified any law, anywhere, at any time, between 1791 and 1868 that prohibited
5 simple possession of a gun or its magazine or any container of ammunition (unless the
6 possessor was an African-American or a slave or a mulatto).¹⁷⁸

7 Surely, with 315 other entries in the State’s law list, there must be many other laws
8 in the relevant time period of demonstrating a tradition of firearm regulation analogous to
9 the large capacity magazine ban. What else is there?

10 **ii. No Gun Laws In The Northern States For 50 Years**

11 From the adoption of the Second Amendment through the next 50 years, there
12 were no firearm restrictions in any states north of the Mason-Dixon Line.¹⁷⁹ One could
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15 B. Kopel and Joseph G.S. Greenlee, *This History of Bans on Types of Arms Before 1900*
16 50 J. of Legis., Apr. 25, 2023, at 45–46 (2024), <https://ssrn.com/abstract=4393197>
17 [<https://perma.cc/P85U-ASTZ>] (“Before, during, and after the Revolution, no state
18 banned any type of arm, ammunition, or accessory. Nor did the Continental Congress,
19 the Articles of Confederation Congress, or the federal government created by the U.S.
20 Constitution in 1787 There is no evidence that any of the Founders were concerned
21 about individuals having too much firepower. After a long, grueling war against the
22 world’s strongest military, limiting individuals’ capabilities was not a concern.”).

23 ¹⁷⁸ Even before *Bruen* was decided, at least one other judge has applied the text, history,
24 and tradition test with analogical reasoning for a 10-round magazine ban, and came to the
25 same conclusion. See *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. AG N.J.*, 974 F.3d 237,
26 258 (3d Cir. 2020) (Matey, J. dissenting) (“This history reveals a long gap between the
27 development and commercial distribution of magazines, on the one hand, and limiting
28 regulations, on the other hand. . . . Some will argue there must be an outer boundary to
this analysis that, when crossed, renders a magazine dangerous and unusual. If so, it does
not appear in the history and traditions of our Nation. . . . As a result, and limited to this
record, I would hold that magazines are arms protected by the Second Amendment and
an act limiting magazine capacity to 10 rounds burdens the Appellants’ Second
Amendment rights.”).

¹⁷⁹ The Mason-Dixon Line established the boundary line between Pennsylvania and
Maryland. Beyond its importance as a literal boundary between states, “the Mason-

live in any of the northern states without restrictions of almost any kind.¹⁸⁰ A gun owner enjoyed freedom with no infringing prohibitions from 1789 to 1845 in Pennsylvania, New York, Connecticut, Massachusetts, New Hampshire, Rhode Island, Vermont, Maine, Ohio, Illinois, Michigan, or Indiana. One might never be subject to a later surety statute in Massachusetts (1836) [29] and Maine (1841) [46].¹⁸¹ If anything, regulations were not about what kind of firearm one was *not* allowed to keep, but about the kind of firearm one was *required* to buy and have ready for militia duties.

The same was largely true south of the Mason-Dixon Line (disregarding laws targeting slaves and Indians, neither of which were considered to be citizens by lawmakers). A citizen could reside in any of the northern states and half of the southern states for the first fifty years free from state government firearm restrictions. This

Dixon Line has become known as the boundary between the North and the South. It took on that association on March 1, 1790, when the Pennsylvania Assembly passed legislation ending slavery in the state. Thus, the Mason-Dixon Line became the legal and the philosophical boundary between slave territory and free land, since slavery was still allowed in Maryland. That was especially true after the Missouri Compromise was passed in 1820, which prohibited slavery north of the Mason-Dixon Line. To the many slaves who used whatever means necessary to reach free land, the Mason-Dixon Line became important to their freedom. For the slaves located in Maryland, they only needed to get to the state line to secure their freedom, although many continued traveling north in an attempt to get as far away from their former masters as possible.” Kathryn DeVan, *Our Most Famous Border: The Mason-Dixon Line*, Pa. St. Univ. (fall 2008), <https://pabook.libraries.psu.edu/literary-cultural-heritage-map-pa/feature-articles/our-most-famous-border-mason-dixon-line> [<https://perma.cc/B6WN-DHAC>].

¹⁸⁰ The State lists one New Jersey statute from 1799 as a law purportedly prohibiting the carrying of a pistol with the intent to assault [19], but this appears to be a sentencing enhancement statute applicable only if one was apprehended for burglary. *See An Act to Describe, Apprehend and Punish Disorderly Persons* (1799), Duke Ctr. For Firearms L., Charles Nettleton, *Laws of the State of New-Jersey Page 474, Image 501 (1821) available at The Making of Modern Law: Primary Sources*, <https://firearmslaw.duke.edu/laws/charles-nettleton-laws-of-the-state-of-new-jersey-page-474-image-501-1821-available-at-the-making-of-modern-law-primary-sources/>.

¹⁸¹ That the two states would share similar laws makes sense since Maine was part of the larger Commonwealth of Massachusetts prior to achieving statehood in 1820.

1 understanding is based on a methodical reading and assessment of the laws set out in the
2 State's survey. While the parties' experts express some disagreements, their contrary
3 opinions are unpersuasive.

4 In the northern states there were hardly any firearm laws at all, let alone a tradition
5 of criminalizing the act of keeping or carrying any firearm. For the District of Columbia,
6 governed by Congress, there were no firearm laws for the first 80 years until a concealed
7 carry prohibition was enacted in 1871. [97]. Maine enacted its first law, a gunpowder
8 storage regulation to prevent fires, in 1821. [27]. Massachusetts enacted its first firearm
9 statute in 1836 as a surety law [29] with Maine following suit in 1841. [46]. *Bruen*
10 already notes that under the surety laws everyone started out with robust carrying rights
11 and *Bruen* saw little evidence that the laws were enforced.

12 Illinois was admitted to the Union in 1818. In 1845, Illinois enacted its first
13 firearm statute criminalizing carrying a gun *with the intent to assault another person*.
14 [49]. Indiana became a state in 1816. In 1855, Indiana criminalized shooting a gun, or
15 throwing stones or sticks, at a train. [62]. The law did not concern keeping any gun
16 whatsoever, or carrying a gun anywhere, in any manner whatsoever.¹⁸² Ohio became a
17 state in 1808. The State's law list shows no Ohio state laws respecting firearms until
18 1859. [70]. Ohioans did not have a gun law until nearly 70 years after the adoption of
19 the Second Amendment. Its first gun law was one that prohibited carrying a pistol, bowie
20 knife, dirk, or other dangerous weapon *concealed*. California enacted its first gun
21 regulation in 1853, which criminalized the act of having "upon him any pistol, gun, knife,

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24 ¹⁸² The State's law list erroneously describes the 1855 Indiana law as one prohibiting the
25 carrying of a pistol with the intent to injure another. This appears to be a scrivener's
26 error. Although the State does not include it in its law list, Indiana may have enacted an
27 earlier statute prohibiting carrying a pistol concealed, with an exception made for
28 travelers. "In *State v. Mitchell*, 3 Blackf. 229, 1833 WL 2617 (Ind. 1833), the Supreme
Court of Indiana, in a one-sentence opinion, upheld a state statute prohibiting the general
public from carrying concealed weapons." *Peruta v. Cnty. of San Diego*, 824 F.3d 919,
933 (9th Cir. 2016).

1 dirk, bludgeon, or other offensive weapon, with intent to assault any person.” [57].

2 In short, the history and tradition of the northern states, states north of the Mason-
3 Dixon Line, was to leave firearm ownership and use completely unregulated. From the
4 time of the adoption of the Second Amendment to the time of the adoption of the
5 Fourteenth Amendment, there were no state gun laws in Pennsylvania, New York,
6 Connecticut, Rhode Island, Vermont, New Hampshire, Michigan, Wisconsin, Minnesota,
7 Iowa, Nebraska, Kansas, Missouri, or the District of Columbia. In Massachusetts and
8 Maine there were only surety statutes. In New Jersey there was a sentencing
9 enhancement for carrying a pistol while committing a burglary. In this half of the nation,
10 keeping and bearing firearms was done freely without government interference.

11 **iii. No Gun Laws In The Southern States For 50 Years**

12 South of the Mason-Dixon Line, where slavery was practiced, there were many
13 laws restricting firearms for slaves, African-Americans, and Indians. Setting aside that
14 obviously unconstitutional tradition, among the southern states firearm ownership was
15 largely unregulated for at least the first 50 years after 1791. Like the northern states,
16 from 1791 to 1868 there were no state gun laws in Delaware, North Carolina, South
17 Carolina, Mississippi, Florida, West Virginia, and Texas, according to the State’s law list.

18 The few laws in other southern states that did exist concerned mainly: (1) carrying
19 a pistol *with the intent to assault another*; and (2) carrying a pistol in a *concealed*
20 manner. Tennessee enacted the first firearm regulation in the southern states in 1801 in
21 the form of a surety law—it was a law dismissed by *Bruen*. [20]. A decade later in
22 1811, Maryland passed the second firearm regulation in the south. [23]. The Maryland
23 law was, not a prohibition, but a sentencing enhancement for carrying a pistol *with the*
24 *intent to assault another*.

25 In 1813, Louisiana passed the first law prohibiting the carrying of a *concealed* gun.
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27
28

1 [24].¹⁸³ *Bruen* noticed that a Louisiana court found the prohibition on concealed carrying
2 constitutional only because it permitted open carrying of a firearm.¹⁸⁴ Kentucky passed a
3 prohibition on carrying a *concealed* pistol that year, although it is omitted from the
4 State’s law list. Perhaps it is omitted because Kentucky’s concealed carry law was struck
5 down as unconstitutional a short time later. The only other firearm regulation in the
6 south during this time period was Georgia’s 1816 law prohibiting the carrying of a pistol
7 *with intent to assault* another person. [25].

8 Around 50 years after the Second Amendment, four southern states passed their
9 own first firearm regulations, also in the form of *concealed* carry prohibitions. In 1837,
10 Arkansas banned carrying a pistol concealed unless on a journey. [32]. In 1837, Georgia
11 added its own prohibition on carrying a pistol concealed. [33]. The constitutionality of
12 the Georgia law was upheld because open carry was unregulated.¹⁸⁵ In 1838, Virginia
13 prohibited carrying a pistol concealed. [40]. In 1839, Alabama prohibited carrying a
14 firearm concealed [41], later adding exceptions for self-defense and for travelers. [45].¹⁸⁶

15 Three more regulations were enacted in the south in the years leading up to the
16 Fourteenth Amendment’s adoption. In 1856, Tennessee passed a law affecting only
17 minors. [65]. In 1868, Florida prohibited carrying secretly “arms of any kind whatever”
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19
20 ¹⁸³ Louisiana reenacted similar, if not the same, statutes two more times, in 1842 and
21 again in 1855. [63].

22 ¹⁸⁴ 142 S. Ct. at 2146 and n.19 (quoting *State v. Chandler*, 5 La. 489, 490 (1850)
23 (“Louisiana concealed-carry prohibition ‘interfered with no man’s right to carry arms (to
24 use its words) ‘in full open view,’ which places men upon an equality”)).

25 ¹⁸⁵ *Nunn v. State*, 1 Ga. 243, 251 (1846) (“We are of the opinion, then, that so far as the
26 act of 1837 seeks to suppress the practice of carrying certain weapons secretly, that it is
27 valid, inasmuch as it does not deprive the citizen of his natural right of self-defence, or of
28 his constitutional right to keep and bear arms. But that so much of it, as contains a
prohibition against bearing arms openly, is in conflict with the Constitution, and void.”).

¹⁸⁶ *Lockett v. State*, 47 Ala. 42, 45–46 (1872) (“Nor is it required that he should have any
necessity for the use of his pistols. It is enough if he was traveling on a journey, long or
short.”).

1 and the outright carrying of a pistol or other arm or weapon. [90]. The Florida law was
2 not scrutinized in a published court decision.¹⁸⁷

3 Significantly, the first restriction on a *dangerous and unusual* firearm did not occur
4 until 1868, the year the Fourteenth Amendment was adopted. That year, Alabama
5 prohibited carrying a rifle walking cane. [87]. A rifle walking cane was a single shot
6 rifle disguised to appear as a walking cane with a variety of handles. When fired, one
7 bullet would exit through the bottom of the cane. It was patented in 1858 and
8 manufactured by the E. Remington & Sons company until approximately 1888, with less
9 than 2,000 produced.¹⁸⁸ Remington was the only major gun maker to produce a rifle
10 walking cane gun. California currently has a law prohibiting possession of a “cane gun.”
11 See Cal. Penal Code § 24410.

12 In short, the history and tradition of the states south of the Mason-Dixon Line, was
13 to leave firearm ownership and use mostly unregulated. At least for the first half of the
14 century, in this half of the nation, keeping and bearing firearms was done freely, with a
15 handful of states enacting prohibitions on carrying pistols in public in a concealed
16 manner, and Maryland and Georgia making it a crime to carry a firearm with the intent to
17 assault another person.

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20 ¹⁸⁷ However, an 1867 court decision considered an earlier law where only *concealed*
21 carrying was prohibited. See *Sutton v. State*, 12 Fla. 135, 136 (1867) (“The statute under
22 which this indictment was found provides, ‘that hereafter it shall not be lawful for any
23 person in this State to carry arms of any kind secretly on or about their person, &c.:
24 Provided, that this law shall not be so construed as to prevent any person from carrying
25 arms openly outside of all their clothes’ The statute was not intended to infringe
26 upon the rights of any citizen to bear arms for the ‘common defense.’ It merely directs
27 how they shall be carried, and prevents individuals from carrying concealed weapons of a
28 dangerous and deadly character, on or about the person, for the purpose of committing
some malicious crime, or of taking some undue advantage over an unsuspecting
adversary.”).

¹⁸⁸ See Remington Soc’y of Am., *Remington Cane Guns*,
<https://www.remingtonsociety.org/remington-cane-guns/> [<https://perma.cc/A74W-EHPT>]
(last visited May 26, 2023).

1 **iv. Territories**

2 Among the State’s law list is a number of regulations from 19th century territories.
3 *Bruen* has already considered such laws and decided they are not particularly helpful for
4 several reasons. “First, the bare existence of these localized restrictions cannot overcome
5 the overwhelming evidence of an otherwise enduring American tradition”¹⁸⁹ “These
6 territorial ‘legislative improvisations,’ which conflict with the Nation’s earlier approach
7 to firearm regulation, are most unlikely to reflect ‘the origins and continuing significance
8 of the Second Amendment’ and we do not consider them ‘instructive.’”¹⁹⁰ “Second,
9 because these territorial laws were rarely subject to judicial scrutiny, we do not know the
10 basis of their perceived legality we fail to see how they inform ‘the origins and
11 continuing significance of the Amendment.’”¹⁹¹ “Finally, these territorial restrictions
12 deserve little weight because they were—consistent with the transitory nature of
13 territorial government—short lived Thus, they appear more as passing regulatory
14 efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an
15 enduring American tradition of state regulation.”¹⁹² One commentator disagrees.¹⁹³
16 Even so, the territorial regulations suggest an absence of gun bans during the most
17 important historical period.

18 None of the territorial regulations from 1791 to 1868 prohibited a firearm. There
19 were no prohibitions on owning firearms of any type. There were no prohibitions on
20 keeping a firearm of any type for self-defense, whether in the home or in public. The
21 first territorial regulation came approximately 47 years after the Second Amendment (in
22 1839) and prohibited the carrying of a firearm in a *concealed* manner in the Florida
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25 ¹⁸⁹ *Bruen*, 142 S. Ct. at 2154.

26 ¹⁹⁰ *Id.* (quoting *Heller*, 554 U.S. at 614).

27 ¹⁹¹ *Bruen*, 142 S. Ct. at 2155 (quoting *Heller*, 554 U.S. at 592).

28 ¹⁹² *Id.* (citations omitted).

¹⁹³ See Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 Wash. Univ. L. Rev. (2023), <https://ssrn.com/abstract=4372185>.

1 Territory. [42]. In other words, for the first 40 years of the nation’s history, the only
2 territorial restriction on firearms, was in the Florida territory taken from Spain in 1819.

3 In 1853, the New Mexico Territory also adopted a *concealed* carrying prohibition.
4 [58]. In 1854, the Washington Territory prohibited *exhibiting* a pistol in a rude, angry, or
5 threatening manner, reenacting a similar law in 1859. [60, 71]. The Nebraska Territory
6 made it a crime to carry a pistol *with the intent to assault* another person in 1858. [68]
7 The Colorado Territory (in 1862 and again in 1867) and the Montana Territory (in 1864)
8 restricted the *concealed* carrying of a pistol in a city, town, or village. [75, 79, 84].
9 While these territorial laws do evidence some later restrictions on the manner of carrying
10 firearms in some public places, they do not not evidence a history or tradition of
11 prohibiting any firearms of any type.

12 **v. California’s First Concealed Carry Law Was a Failure**

13 In 1863, California’s homicide rate reached “catastrophic levels.”¹⁹⁴ With no
14 Second Amendment analogue in the state constitution, California’s solution was to ban
15 carrying concealed weapons. The experiment failed. In 1870, the legislature repealed the
16 law, because it disarmed the good citizen, but the law was not followed by “the vast
17 majority of roughs, fighting men, and predatory characters,”¹⁹⁵ and the police were “apt
18 to arrest any quiet citizen” with a concealed weapon.¹⁹⁶

19 **B. Historical Twins**

20 *Bruen* concluded that “[n]one of these historical limitations on the right to bear
21 arms approach New York’s proper-cause requirement because none operated to prevent
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24 ¹⁹⁴ Decl. of Randolph Roth, Dkt. 118-8 (“Roth Decl.”), at ¶ 36.

25 ¹⁹⁵ *Id.* at ¶ 37 and n.84 (citing Clayton E. Cramer and Joseph E. Olson, *The Racist*
26 *Origins of California’s Concealed Weapon Permit Law*, SSRN (Aug. 12, 2016) (quoting
27 *The Carrying of Concealed Weapons*, Daily Alta (San Francisco) California, March 13,
1869, at 2, and *Concealed Deadly Weapons*, Sacramento Daily Union, December 16,
1870, at 2.)).

28 ¹⁹⁶ *Id.*

1 law-abiding citizens with ordinary self-defense needs from carrying arms in public for
2 that purpose.”¹⁹⁷ The same can be said about California’s magazine ban. To paraphrase
3 the Supreme Court, none of these historical limitations on the right to bear arms approach
4 California’s complete ban on magazines able to hold more than 10 rounds. None
5 operated to prevent law-abiding citizens from possessing as much ammunition as they
6 thought best.

7 A historical twin is not unimaginable. It could have been the case that the early
8 states prohibited having large capacity gunpowder sacks, or, they might have prohibited
9 carrying more than 10 lead bullets. There were no such restrictions. There are no
10 Founding-era dead ringers or historical twins. Of course, the State does not need to find a
11 historical twin, but a second cousin twice-removed, is not enough.

12 **V. ANALOGUES**

13 Although the State does not identify any historical twins of its restrictions on
14 magazines, it may not have to. A history and tradition of a relevantly similar firearm
15 regulation could suffice. After all, it can be argued that removable magazines represent a
16 dramatic change in technology and the State is attempting to address a modern societal
17 concern. In such cases, *Bruen* allows a more nuanced approach. On one hand, compared
18 to muskets of the colonial era, a Glock 17 with its 17-round magazine clearly represents a
19 dramatic technological advancement. On the other hand, the lever-action repeating
20 Henry and Winchester rifles popular at the time of the Fourteenth Amendment were
21 already dramatic technological advancements in firearms. These popular lever-action
22 rifles had large tubular magazines that held a lot of ammunition and could be fired
23 multiple times in succession, accurately and quickly. Yet, there are no state prohibitions
24 on possession or manufacture of these lever-action rifles in the State’s law list.

25 In any event, while California does not need to identify a dead ringer for its
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28 ¹⁹⁷ 142 S. Ct. at 2150.

1 magazine ban, “California cannot satisfy the requirement for a closely analogous
2 historical regulation by reference to any general firearm regulation California might
3 unearth.”¹⁹⁸

4 **A. The State’s Best Historic Analogue? A New York City Gunpowder**
5 **Storage Law Following the Worst City Fire in Colonial America**

6 Asked to identify the best historic analogue to its sweeping prohibition on large
7 capacity magazines, the State identified a New York City gunpowder storage law
8 following the worst city fire in Colonial America. With the assistance of scholars who
9 have studied historic laws for years the State identified a 1784 statute regulating the
10 amount of gunpowder that could be stored inside a New York City building.¹⁹⁹ Because
11 the State has identified this as its best analogue, it deserves closer consideration.

12 The gunpowder storage law has nothing to do with gun violence. It was a *fire*
13 *safety regulation*. Unsurprisingly, the law was enacted after New York City suffered two
14 great fires, one of which is described as, “The most destructive fire in colonial North
15 America.”²⁰⁰ The first fire, in the year 1776, burned much of Manhattan to the ground
16 and destroyed 493 houses in its path. In 1778, a second fire swept through the city and
17 destroyed 54 more houses and several warehouses.²⁰¹ After these two terrible fires the
18 New York State legislature responded with a law for New York City limiting the quantity
19 of gunpowder that a person could store in any one building to 28 pounds. It applied only
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23 ¹⁹⁸ *Baird*, 2023 WL 5763345, at *8.

24 ¹⁹⁹ See Defendant’s Response Brief in Response to the Court’s Order Entered on
25 February 7, 2023, Dkt. 143, at 1, identifying 1784 Laws of N.Y. 627, chapter 28.

26 ²⁰⁰ New York City Fire Museum, *The Great New York Fire of 1776* (Mar. 21, 2023),
<https://www.nycfiremuseum.org/greatfire1776> [<https://perma.cc/A3BW-TQRP>].

27 ²⁰¹ Richard Howe, *Notes on the Great Fires of 1776 and 1778* (2014), The Gotham
28 Center for New York City History, <https://www.gothamcenter.org/blog/notes-on-the-great-fires-of-1776-and-1778> [<https://perma.cc/WJ4V-3QKP>].

1 to that part of Manhattan from city hall on the south end to one mile north.²⁰² Gunpowder
2 was to be stored in fireproof stone jugs or tin canisters holding no more than 7 pounds
3 each. Reinforcing that the law was enacted to prevent fires, it also required gunpowder
4 be contained to prevent spills during transport through the streets.²⁰³

5 There was much the law did not do. It did not limit the total amount of gunpowder
6 a person could own or use, as long as quantities over 28 pounds were kept in the public
7 magazine or in additional buildings. It placed no limit on the number of lead bullets a
8 person could keep or possess. It did not restrict a person from keeping his firearms
9 loaded with gunpowder and bullets in his home, business, or when in public. Beyond the
10 one mile stretch of lower Manhattan island, the law had no application anywhere else in
11 the state. And 28 pounds is a lot of gunpowder. One New York militia soldier was
12 required to bring $\frac{1}{4}$ pound of gunpowder when called to muster.²⁰⁴ So, 28 pounds of
13 gunpowder could outfit 112 militia men. As the State's expert Professor Cornell notes,
14 "Twenty to thirty pounds of gunpowder is certainly not an inconsiderable amount."²⁰⁵
15

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17 ²⁰² "[I]t shall not be lawful . . . to have or keep any quantity of gun powder exceeding
18 twenty-eight pounds weight, in any one place, less than one mile to the northward of the
19 city hall . . . except in the public magazine at the Fresh-water"

20 ²⁰³ The law specified, "[a]nd in order to prevent any fatal consequences which may arise,
21 from the carriage of gun powder, in and through the streets of the city of new York, by
22 carts, carriages, or by hand, or otherways [sic], it shall be in a tight cask, well headed and
23 hooped, and shall be put into bags or leather-cases, and intirely [sic] covered therewith,
24 so as that none be spilt or scattered in the passage thereof" 1784 Laws of N.Y at
25 628.

26 ²⁰⁴ See Stats. at Large, New York 1867, Chapter X, Title VII, Article 1, §6, at 287 (eff.
27 1835) (penalties for militia men ill-equipped) ("[F]or want of two spare flints and a
28 knapsack, twenty four cartridges, shot-pouch, powder-horn, twenty balls, and *a quarter of*
a pound of powder, twenty five cents each"),
https://books.google.com/books/content?id=RkkwAQAAMAAJ&pg=PA287&img=1&zooom=3&hl=en&bul=1&sig=ACfU3U3ooEDz2oBmZb_g3qythhk8S6UJOg&ci=99%2C102%2C820%2C820&edge=0 [https://perma.cc/KS72-L87G].

²⁰⁵ Saul Cornell & Nathan DeNiro, *A Well Regulated Right*, 73 Fordham L. Rev. 487
n.173 (2004).

1 For nuanced analogues, the New York City gunpowder storage law fails the why
2 and how tests.²⁰⁶ The “why” of the large capacity magazine ban is to introduce a “critical
3 pause” into a mass shooter’s unrelenting attack. The “why” of the historic gunpowder
4 storage law is to reduce the risk of building fires. The “how” of the large capacity
5 magazine ban is limiting the number of ammunition rounds that can be loaded in a gun
6 for self-defense. The “how” of the historic gunpowder storage law burden was
7 generously limiting the storage (and not the amount loaded into guns for self-defense) of
8 gunpowder for a geographic area smaller than one square mile. In the end, the State’s
9 proposed analogue is not relevantly similar.

10 One other gunpowder storage law mentioned by the State which applied only in the
11 city of Boston, Massachusetts, fares no better. This was also a *fire* safety regulation—
12 nothing more.²⁰⁷ “The ordinance did not prohibit *carrying* loaded firearms within the
13 City of Boston—only leaving them unattended in a building—and . . . this law was for
14 the protection of those fighting fires.”²⁰⁸ In fact, one scholar mused, “Strictly speaking,
15 the law did not forbid bringing an unloaded gun into a building, and then loading it when
16 inside. So, occupants of homes or businesses remained free to keep loaded guns.”²⁰⁹
17 Moreover, the State offers no evidence that the Massachusetts law was enforced. A
18 search of *Thacher’s Reports*, a collection of reports of criminal cases tried in the City of
19 Boston Municipal Court from 1823–1843 reveals no such prosecutions.²¹⁰

21 ²⁰⁶ Courts should examine “how and why the regulations burden a law-abiding citizens’
22 right to armed self-defense.” *Bruen*, 142 S. Ct. at 2132-33.

23 ²⁰⁷ See *Renna*, 20-cv-2190-DMS-DEB, 2023 WL 2846937, *12–13 (citing *Jackson v.*
24 *City & Cnty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014) (stating “Boston’s
25 firearm-and-gunpowder storage law is historically distinct from the challenged firearm
regulation in light of *Heller*”).

26 ²⁰⁸ Clayton E. Cramer and Joseph Edward Olson, *Pistols, Crime, and Public: Safety in*
Early America, 44 Willamette L. Rev. 699, 705 (2008) (emphasis in original).

27 ²⁰⁹ *Id.*

28 ²¹⁰ *Thacher’s Reports* may be found at <https://www.mass.gov/info-details/historical-massachusetts-cases#1800-1899->.

1 This whole gunpowder storage argument has been raised before and it has been
2 rejected before. It was raised a dissent in *Heller* and relied on the same laws of New
3 York and Massachusetts, and the same writings of Cornell.²¹¹ The *Heller* majority was
4 unimpressed. *Heller* says,

5 The other laws Justice Breyer cites are gunpowder-storage laws
6 that he concedes did not clearly prohibit loaded weapons, but
7 required only that excess gunpowder be kept in a special
8 container or on the top floor of the home. Nothing about those
9 fire-safety laws undermines our analysis; they do not remotely
burden the right of self-defense as much as an absolute ban on
handguns.²¹²

10 Applying the same reasoning to this case, the early fire-safety gunpowder storage laws do
11 not remotely burden the self-defense right as much as an absolute ban on magazines
12 holding more than 10 rounds.

13 **B. The State's Historic Analogue No. 2: Concealed Carry Laws**

14 Next, the State turns to historic laws regulating the *concealed* carrying of bowie
15 knives, dirks, sword canes, and some pistols, as analogues.

16 **i. Pocket Pistols**

17 Some historic laws prohibited carrying a pocket pistol in a concealed manner. By
18 1868, about a dozen states had laws prohibiting carrying concealed pistols. Importantly,
19 the concealed carry laws did not prohibit either keeping pistols for all lawful purposes or
20 carrying all guns openly. And none included long guns or ammunition containers in their
21 restrictions. Pocket pistols were entirely lawful to keep and use at home for self-defense.

22 Prohibiting the concealed carrying of a pistol was constitutionally permissible only
23 when a citizen could freely keep and carry the same gun openly. The statutes were often
24 tested in court, suggesting that any broad carrying restriction ran close to the
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28 ²¹¹ *Heller*, 554 U.S. at 684–86 (Breyer, J., dissenting).

²¹² *Id.* at 631–32.

1 constitutional line. Today’s large capacity magazine ban prohibits carrying magazines in
2 any manner -- and even more restrictively prohibits simple possession.

3 Historic concealed carry laws for pistols have a different “why” and “how” than do
4 the State’s large capacity magazine ban. The “why” of a concealed carry law was to
5 prevent unfair surprise attacks by a person who appeared to be unarmed. The “how” of
6 the historic concealed carry prohibitions was to proscribe the manner of carrying a pocket
7 pistol and only when in public. The substantial burden imposed by the large capacity
8 magazine ban is not analogous to the burden created by a concealed carry restriction for
9 public carrying of a pocket pistol. Such a history and tradition of concealed carry
10 prohibitions are not nuanced analogues for California’s magazine ban as they are not
11 relevantly similar.

12 **ii. Dirks, Daggers, Sword Canes, and Bowie Knives**

13 The State now asks the Court to compare firearms equipped with large capacity
14 magazines to knives. Undoubtedly, dirks, daggers, and bowie knives are dangerous. But
15 dirks, daggers, sword canes, and bowie knives were not firearms; they were bladed
16 instruments. *Bruen* says the state’s burden is to identify a historical *firearm* regulation,
17 not a knife regulation. In the dissent, knives were cited only where territorial laws also
18 affected the carrying of pistols, presumably because of the pistols.²¹³ *Heller* did not
19 mention knife laws at all in evaluating the District of Columbia’s handgun ban. And the
20 Supreme Court’s plurality did not mention bowie knives in evaluating Chicago’s
21 handgun ban, except as an example of Reconstruction-era efforts to disarm African-
22 Americans.²¹⁴ This is not to say that bowie knives are not “arms” imbued with Second
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25 ²¹³ *Id.* at 2186 (Breyer, J. dissenting) (“For example, Georgia made it unlawful to carry,
26 ‘unless in an open manner and fully exposed to view, any pistol, (except horseman's
27 pistols,) dirk, sword in a cane, spear, bowie-knife, or any other kind of knives,
28 manufactured and sold for the purpose of offence and defence.’ Ga. Code § 4413
(1861).”).

²¹⁴ *McDonald*, 561 U.S. at 771.

1 Amendment protection.²¹⁵ Historical knife laws would be relevant in evaluating a modern
2 prohibition on knives. It is simply to say that historical *firearm* regulations are obviously
3 more likely to be relevant analogues for modern *firearm* restrictions.

4 Even if knife regulations were relevant, they would not help the State much.²¹⁶
5 There were laws restricting bowie knives in some states in the 1800's, but not the vast
6 majority of states. There is also little evidence of actual prosecutions for simply
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9 ²¹⁵ See, e.g., David B. Kopel, Clayton E. Cramer and Joseph E. Olson, *Knives and the*
10 *Second Amendment*, 47 U. Mich. J. L. Reform 167, 168 (2013); Defs.' Compendium of
11 Works, Dkt. 158-2, at 65, 67 ("This Article analyzes Second Amendment protection for
the most common 'arm' in the United States – the knife.").

12 ²¹⁶ This opinion is shared by two historians. See David B. Kopel and Joseph G.S.
13 Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. of Legis., Apr. 25,
14 2023, at 168–69 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393197
15 [<https://perma.cc/P85U-ASTZ>] ("Bans on modern rifles and magazines cannot be rescued
16 by diverting attention away from the legal history of firearms law, and instead pointing to
17 laws about other arms. Dozens of state and territorial legislatures enacted laws about
Bowie knives, as well as dirks and daggers. Prohibitory laws for these blades are fewer
than the number of bans on carrying handguns, and *Bruen* found the handgun laws
insufficient to establish a tradition constricting the Second Amendment.

18 As for other non-blade impact weapons, the sales and manufacture bans in a
19 minority of states for slungshots and knuckles could be considered as involving arms "not
typically possessed by law-abiding citizens for lawful purposes."

20 Other flexible impact arms, most notably blackjacks, were "typically possessed by
law-abiding citizens for lawful purposes," especially by law enforcement officers.
21 Likewise, modern semiautomatic rifles and standard magazines are also highly preferred
by today's law enforcement officers.

22 For blackjacks and sand clubs, only one state, New York, enacted a sales and
23 manufacture ban. That came at a time when the legislature was unencumbered by a
Second Amendment enforceable against the states or by a state constitution right to arms.
24 As *Bruen* teaches, a lone eccentric state does not create a national legal tradition.

25 For every arm surveyed in this article, the mainstream American legal tradition
26 was to limit the mode of carry (no concealed carry), to limit sales to minors (either with
bans or requirements for parental permission), and/or to impose extra punishment for use
27 in a crime.

28 The fact that most states banned concealed carry of Bowie knives is not a
precedent to criminalize the mere possession of modern rifles and magazines.").

1 possessing a bowie knife, much less a judicial opinion on constitutionality. One court
2 observed that a Tennessee bowie knife law was generally disregarded.²¹⁷

3 The argument that a cluster of laws prohibiting the carrying of dangerous knives
4 could justify a gun ban, lost its wind in *McDonald*. If the regulation of knives was not a
5 sufficient analogue for restricting handguns in Chicago, neither are regulations of dirks,
6 daggers, sword canes, and bowie knives useful analogues for prohibiting modern
7 magazines.

8 **C. The State's Historic Analogue No. 3: Guns Set as Traps**

9 Historic laws prohibiting trap guns are proposed as a third analogue by the State.
10 What the State does not admit or seem to recognize is that “trap guns” are not guns at all.
11 They are a method by which a gun, any gun, can be set up to fire indiscriminately
12 through the use of springs, strings, or other atypical triggering mechanism without
13 needing an operator. Nonetheless, absent from our history is a tradition of trap gun
14 restrictions in the important years between the 1791 and 1868. The 1771 New Jersey trap
15 gun law, upon which the State relies, predates the Declaration of Independence, New
16 Jersey statehood,²¹⁸ and the Second Amendment. Ninety-five years passed before a
17 second restriction on trap gun was enacted and that one applied only to the Utah Territory
18 (1865). [80]. Within the states, the first regulation on setting a trap gun, was enacted in
19 Minnesota in 1873. [109]. Two states followed later in 1875 (Michigan) and 1884
20

21
22 ²¹⁷ See, e.g., *Day v. State*, 37 Tenn. 496, 499 (Tenn. 1858) (“It is a matter of surprise that
23 these sections of this act, so severe in their penalties, *are so generally disregarded* in our
24 cities and towns.”) (describing state law prohibiting the concealed carrying of bowie
knives) (emphasis added).

25 ²¹⁸ New Jersey was one of the few states that did not have in its state constitution a
26 provision like the Second Amendment. (Six states do not have provisions protecting a
27 right to arms in their state constitutions: California, New Jersey, New York, Maryland,
28 Minnesota, and Iowa.) See David B. Kopel and Clayton E. Cramer, *State Court
Standards of Review for the Right to Keep and Bear Arms*, 50 Santa Clara L. Rev 1113,
1145 n.51 (2010).

(Vermont). In other words, trap guns were not prohibited by law in the District of Columbia or 36 of the 37 states (then existing), until 1873. California did not enact its own trap gun law until 1957.²¹⁹ Court decisions between 1791 and 1868 recognized that it was entirely lawful to use trap guns (or spring guns, as they were sometimes called) to defend one’s property.²²⁰ If this is what a national tradition of trap gun regulation looks like, it is a strange look, indeed.

Claiming trap guns were “dangerous weapons commonly used for criminal behavior and not for self-defense,”²²¹ the State has a problem with the facts. There is little historical evidence that trap guns were used for criminal behavior. Rather, guns

²¹⁹ See Cal. Fish & Game Code § 2007.

²²⁰ See, e.g., *Gray v. Combs*, 7 J. J. Marsh, 478 (Ky. 1832) (one who sets traps or spring guns to protect valuable property by means of which another is killed while attempting to enter the premises is guilty of no crime); *Loomis v. Terry*, 1837 WL 2808 (N.Y. Sup. Ct. 1837) (“It is not like setting spring guns with public notice of the fact; for even that has been held warrantable as being necessary (*Ilott v. Wilkes*, 3 Barn. & Ald. 304.)”); *State v. Moore*, 31 Conn. 479, 479–80 (Conn. 1863) (“Breaking and entering a shop in the night season with intent to steal, is by our law burglary, and the placing of spring guns in such a shop for its defense, would be justified if a burglar should be killed by them.”); *Maenner v. Carroll*, 46 Md. 193, 208 (Md. Ct. App. 1877) (“While it is decided that traps, spring-guns, and other dangerous instruments, may be lawfully placed on private grounds, for the purpose of deterring trespassers or catching strange animals doing damage”); see also *Simpson*, 59 Ala. at 18 (citing *Moore*, 31 Conn. at 479) (“The setting a spring-gun on his premises, by the owner, is culpable only because of the intent with which it is done. Unless the public safety is thereby endangered, it is not indictable. If dangerous to the public, it is indictable as a nuisance.”); *United States v. Gilliam*, 25 F. Cas. 1319, 1320 and n.2 (D.C. Crim. Ct. 1882) (“The setting of a spring-gun as a protection for property, though not in itself unlawful and indictable, is certainly undeserving of encouragement. . . .”) (citing English common law and the court of King’s Bench, *Ilott v. Wilkes*, 3 Barn. & Ald. 304 (‘A trespasser, having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidental treading on the latent wire connecting with the gun, and thereby letting it off.’)).

²²¹ Defs’ Br. in Resp., Dkt. 145, at 10 (quoting *Oregon Firearms Fed’n, Inc. v. Brown*, No. 2:22-cv-01815-IM, 2022 WL 17454829, at *13 (D. Or. Dec. 6, 2022), *appeal dismissed*, No. 22-36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022)).

were set as traps by common people to protect their property from thieves and sometimes for self-defense against burglars. Perhaps just as often trap guns were used to hunt game. Historian and expert witness for the State, Robert Spitzer opines about trap guns: (1) “[t]hose who set gun traps typically did so to defend their places of business, properties, or possessions;” and (2) “opinion was more divided . . . with some arguing that thieves or criminals hurt or killed by the devices had it coming.”²²² So, when the State claims trap guns were used by criminals and not for self-defense, it gets the facts backwards. The how and why of the two types of regulations are not relevantly similar, thus trap gun laws are not useful analogues for prohibiting modern magazines.

D. The Best Analogue: Laws Requiring Citizens to Keep and Carry Sufficient Bullets and Gunpowder for Service in the Militia

California ignores Founding-era laws that present the best analogue to its present-day magazine law. These are the manifold early militia laws requiring each citizen, not to limit the amount of ammunition he could keep, but to arm himself with *enough* ammunition: at least 20 rounds.²²³

Government remains fixed on the notion that it alone can decide that anything larger than a 10-round magazine is not “suitable” for a citizen to have. But, there are no analogous cases in our history. There are no cases where American government dictated that lever-action rifles were unsuitable because single shot rifles were good enough, or

²²² (U.S.D.C. Oregon Dkt. 17-2 at ¶¶ 34–53) (first filed in the instant case).

²²³ See, e.g., 1784 Mass. Acts 142; 1786 N. Y. Laws 228; 1785 Va. Statutes at Large 12 (12 Hening c. 1); 1 Stat. 271 (1792) (Militia Act); Herbert L. Osgood, *The American Colonies in the Seventeenth Century*, 499–500 (1904) (explaining that states often required citizens to equip themselves with adequate firearms and ammunition, including between 20 and 24 cartridges at minimum); *Silveira v. Lockyer*, 328 F.3d 567, 586 (9th Cir. 2003) (“Much as building codes today require smoke detectors in the home, a man had to have a bullet mould, a pound of powder, four pounds of lead, and twenty bullet^s, to be produced when called for by a militia officer.”) (Kleinfeld, J., dissenting).

1 revolvers were unsuitable because derringers were good enough.²²⁴ These choices have
2 always belonged to the People to decide for themselves how much firepower they need.

3 The right to have firearms for social security was important at the time the
4 Constitution was adopted. There were many enemies of the young nation. An armed
5 citizenry provided a much-needed deterrent effect. Early citizens remembered how the
6 Minutemen of Lexington and Concord, Massachusetts, by assembling as a militia, fought
7 back against the hostile British march to take away guns and gunpowder in April 1776.

8 During the Nation's founding-era, federal and state governments enacted laws for
9 the formation and maintenance of citizen militias. Three such statutes are described in
10 *Miller*.²²⁵ Rather than restricting too much firing capacity, the laws mandated a
11 minimum firing capacity. These statutes required citizens to arm themselves with arms
12 and a minimum quantity of bullets and gunpowder, not to disarm themselves. When
13 Congress passed the Militia Act in 1792,²²⁶ the law required a citizen to be equipped to
14 fire at least 20 to 24 shots.²²⁷ A 1786 New York law required "no less than Twenty-four
15 Cartridges," and a 1785 Virginia law required a cartridge box and "four pounds of lead,
16

17
18 ²²⁴ "I surveyed the gun regulations in the Duke Historical Database from the early
19 medieval period through 1885 to see what terminology was used. None of the laws that
20 prohibit weapons, aside from the Maryland statute above, specifies a gun part or
21 ammunition case or accoutrements of any kind. Although many present a list of banned
22 or prohibited weapons – usually without defining them [the assumption is that the reader
23 knows what they refer to], none of the laws mention cartridge boxes, bullets, barrels, or
24 other parts of any weapons." Declaration of Dennis Baron, Dkt. 118-2, at ¶ 56.

25 ²²⁵ 307 U.S. 174 (1939)

26 ²²⁶ 1 Stat. 271, 2 Cong. Ch. 33.

27 ²²⁷ "That every citizen so enrolled and notified, shall, within six months thereafter,
28 provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare
flints, and a knapsack, a pouch with a box therein to contain not less than *twenty-four*
cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper
quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn,
twenty balls suited to the bore of his rifle and a quarter of a pound of powder."
(Emphasis added).

1 including twenty blind cartridges.” In 1776, Paul Revere’s Minutemen were required to
2 have 30 bullets and gunpowder.

3 These and other citizen militia laws demonstrate that, contrary to the idea of a
4 firing-capacity upper limit on the number of rounds permitted, there was a legal
5 obligation for the average citizen to have at least 20 rounds available for immediate
6 use.²²⁸ There were no upper limits like § 32310; there were floors and the floors were
7 well above 10 rounds.²²⁹ California’s large capacity magazine ban is a diametrically
8 opposed analogue.

9 As one court explained, “[u]nder *Bruen*, the Second Amendment does not ‘forbid
10 all laws other than those that *actually existed* at or around the time of the Second
11 Amendment’s adoption,’ but rather ‘the Second Amendment must, at most, forbid laws
12 that could not have existed under the understanding of the right to bear arms that
13 prevailed at the time.’”²³⁰ California’s large capacity magazine ban did not exist and
14 could not have existed under the understanding of the Second Amendment at the time of
15 the Founding. This is clear because militia laws of the federal and state governments
16 required citizens to keep and carry more ammunition supplies than 10 rounds. A
17 prohibition like § 32310 would have been impossible to enforce and runs contrary to
18 legal commands for militia readiness.

19 **VI. CONCLUSION**

20 Removable firearm magazines of all sizes are necessary components of
21 semiautomatic firearms. Therefore, magazines come within the text of the constitutional
22

23
24 ²²⁸ *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (citing Joyce Lee
25 Malcolm, *To Keep and Bear Arms* 139 (1994)) (“the colonial militia played a primarily
26 defensive role The dangers all the colonies faced . . . were so great that not only
27 militia members but all householders were ordered to be armed.”).

28 ²²⁹ *Duncan*, 366 F. Supp. at 1150.

²³⁰ Def’s Br. in Resp., Dkt. 142 at 16 (quoting *United States v. Kelly*, No. 3:22-cr-00037,
2022 U.S. Dist. LEXIS 215189, at *14 n.7 (M.D. Tenn. Nov. 16, 2022)).

1 declaration that the right to keep and bear arms shall not be infringed. Because millions
2 of removable firearm magazines able to hold between 10 and 30 rounds are commonly
3 owned by law-abiding citizens for lawful purposes, including self-defense, and because
4 they are reasonably related to service in the militia, the magazines are presumptively
5 within the protection of the Second Amendment. There is no American history or
6 tradition of regulating firearms based on the number of rounds they can shoot, or of
7 regulating the amount of ammunition that can be kept and carried. The best analogue that
8 can be drawn from historical gun laws are the early militia equipment regulations that
9 required all able-bodied citizens to equip themselves with a gun and a minimum amount
10 of ammunition in excess of 10 rounds.

11 Because the State did not succeed in justifying its sweeping ban and dispossession
12 mandate with a relevantly similar historical analogue, California Penal Code § 32310, as
13 amended by Proposition 63, is hereby declared to be unconstitutional in its entirety and
14 shall be enjoined. At this time, the Court's declaration does not reach the definition of a
15 large capacity magazine in California Penal Code § 16740 where it is used in other parts
16 of the Penal Code to define other gun-related crimes or enhance criminal penalties.

17 One government solution to a few mad men with guns is a law that makes into
18 criminals responsible, law-abiding people wanting larger magazines simply to protect
19 themselves. The history and tradition of the Second Amendment clearly supports state
20 laws against the use or misuse of firearms with unlawful intent, but not the disarmament
21 of the law-abiding citizen. That kind of a solution is an infringement on the
22 Constitutional right of citizens to keep and bear arms. The adoption of the Second
23 Amendment was a freedom calculus decided long ago by our first citizens who cherished
24 individual freedom with its risks more than the subservient security of a British ruler or
25 the smothering safety of domestic lawmakers. The freedom they fought for was worth
26 fighting for then, and that freedom is entitled to be preserved still.

27 The Attorney General respectfully requests a stay of any judgment in Plaintiffs'
28 favor for a sufficient period to seek a stay from the Court of Appeals. Dkt. 118 at 61–63;

Dkt. 142 at 25. That request is granted. Therefore, the enforcement of the injunction is hereby stayed for ten days.

IT IS HEREBY ORDERED that:

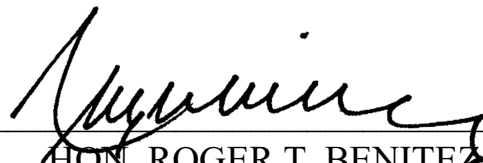
1. Defendant Attorney General Rob Bonta, and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him, and those duly sworn state peace officers and federal law enforcement officers who gain knowledge of this injunction order, or know of the existence of this injunction order, are enjoined from enforcing California Penal Code § 32310.

2. Defendant Rob Bonta shall provide, by personal service or otherwise, actual notice of this order to all law enforcement personnel who are responsible for implementing or enforcing the enjoined statute.

3. This injunction is stayed for ten (10) days from the date of this Order.

IT IS SO ORDERED.

Date: September 22, 2023



HON. ROGER T. BENITEZ
United States District Judge